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ABSTRACT

Some 35 papers resulting from presentations made at the 1974 Conference on Rural Land-Use Policy in the Northeast constitute this report on conference proceedings. Part 1 presents papers from the general sessions which deal with generalities relative to the following four major alternatives: (1) police power, (2) transfer of development rights, (3) public acquisition of easements, and (4) tax and other special incentive policies. Discussions relative to the impact on rural land-use of public agency administrative decisions and the role of the citizen in influencing administrative and legislative land-use policy are also presented. Part 2 presents representative workshop papers which provide examples of alternative policies and programs already underway and describe specific experiences with: use of police power as a land-use control technique; tax and special incentive policies as land-use control techniques; development rights, public acquisition, and easements as land-use control techniques; and influence of public agencies and the legislative process. Part 3 presents conference implications for research and education and the consensus, directions, and issues of rural land-use policy in the Northeast. The conference program, a list of participants, and information on conference sponsors are appended. (JC)

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October 2-4, 1974

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THE PROCEEDINGS

OF THE CONFERENCE ON

RURAL LAND-USE POLICY IN THE NORTHEAST

October 2-4, 1974

Atlantic City
New Jersey

Sponsored by the
Northeast Regional Center for Rural Development
in cooperation with the
Northeast Public Policy Committee, the Northeast Resource Economics Committee,
and the NE-90 Technical Regional Research Project Committee -
all affiliated with the land-grant colleges and universities
in the 12 Northeastern states.

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FOREWORD

The papers in this volume result from a Conference on Rural Land-Use Policy in the Northeast held at Atlantic City October 2-4, 1974. Several of the papers represent a substantial elaboration of the presentation made at the Conference. Citations to sources of additional information have been included where appropriate.

The decision to hold the Conference was based on recommendations and requests from Cooperative Extension and State Agricultural Experiment Station sources within the land-grant institutions of the Northeast. This decision was reinforced by the assessment in the Experiment Station-USDA research planning Task Force report, Rural Development Research in the Northeast For the Next Five Years - A Framework, which placed rural land use at the top of a list of eight high-priority areas recommended for rural development research in the region. The Task Force noted trends which have made land use the center of issues of great importance to individuals and to communities in the northeastern states.

The Conference was intended for extension staff and investigators in the land-grant colleges and universities of the 12-state northeast region together with representatives of public and private agencies and groups with a diverse range of interests and concerns about rural land use.

The general purpose of the Conference was educational - to explore and evaluate alternative policies and programs for land use outside of fully developed city and suburban areas and to create awareness of specific major and innovative on-going rural land-use policies and programs in the Northeast.

Rural land-use issues are complex. There are multiple goals. There are conflicts of interest. Strongly held beliefs and values are involved. Marion Clawson was invited, in the keynote address, to give a national perspective on the issues and alternative policies.

Although the market is the traditional determinant of land use, land is also vested with a public interest. Therefore, the instruments of land-use control raise a series of questions. Four major alternatives - their intended use, their strengths and weaknesses - were analyzed in papers prepared for the general sessions. The four were: (1) police power, (2) transfer of development rights, (3) public acquisition of easements, and (4) tax and other special incentive policies. Impact on rural land use of administrative decisions by public agencies and the role of the citizen in influencing administrative and legislative land-use policy decisions were also examined in general session presentations.

A number of the alternative policies and programs are already being tried out in the Northeast. The workshop sessions were intended to provide an introduction to a useful sample of these experiences. Some involve state-wide programs; others are the result of actions taken by local governments. Some are conducted entirely by private groups rather than by public agencies. Workshop sessions also included attention to citizen influence on public land-use policies and practices.

It was intended that the Conference provide information which could contribute to the educational work of Cooperative Extension with citizens and communities on rural land-use issues. There was also a hope that the presentations and discussion would help identify significant knowledge needs to guide research by Experiment Station and other investigators. In his summary of the Conference, W. Neill Schaller suggests some implications for research and education. He points out that the Conference was "a beginning, not an end".

The paper "A Basic Introduction to Land-Use Control Law and Doctrine", by Professor E. F. Roberts, Cornell Law School, is also available as a separate publication from the Northeast Regional Center for Rural Development. A compilation of State Land-Use Laws in the Northeast, provided each conference participant, is also available as a publication of the Center.

Three regional committees affiliated with the land-grant colleges and universities of the region joined with the Northeast Regional Center for Rural Development in sponsoring the Conference. They are the Northeast Public Policy Committee, the Northeast Resource Economics Committee, and the Technical Committee for the NE-90 regional research project "Rural Land-Use Policy in an Urbanizing Environment".

Members of the ad hoc Planning Committee for the Conference were: William H. Bingham, The Extension Service, Vermont; David J. Burns, Rutgers University; Richard D. Chumney, New Jersey Department of Agriculture; Dale K. Colyer, West Virginia University; Howard E. Conklin, Cornell University; Gerald A. Donovan, University of Rhode Island; Robert F. Hutton, Pennsylvania State University; Olaf F. Larson, Northeast Regional Center for Rural Development; John Van Zandt, New Jersey Department of Agriculture; Silas B. Weeks, University of New Hampshire; Donald J. White, Cooperative Extension, New York; and George D. Wood, Cooperative Extension Service, Maryland.

Local arrangements at Atlantic City were handled by David J. Burns, Richard D. Chumney, and John Van Zandt. The New Jersey Department of Agriculture provided staff for a press service at the Conference.

Center staff members Leslie C. Hyde and Dorothy J. Messenger had a major role in preparing for the Conference. Photographs are by Leslie C. Hyde, who also selected the sources of further information listed with a number of papers. Jocelyn Loh typed the manuscript for this volume.

Alan M. Fletcher was made available by the Cornell University Agricultural Experiment Station and the Department of Communication Arts at Cornell to edit the papers. Howard E. Conklin and Lucy M. Cunnings also contributed to the preparation of papers for publication.

Center sponsorship of the Conference on Rural Land-Use Policy in the Northeast was a part of its program conducted under Section 503 (b) (2), Title V of the Rural Development Act of 1972 and as a part of its program supported by P. L. 89-106 special grant funds provided through the Cooperative State Research Service, U.S. Department of Agriculture.

Olaf F. Larson

Director, Northeast Regional Center
for Rural Development

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PART I

GENERAL SESSIONS

ISSUES AND ALTERNATIVE POLICIES AND TECHNIQUES IN RURAL LAND-USE CONTROL

Comments by Governor Brendan T. Byrne

Secretary Alampi, Dean (Charles) Hess, Dr. Larson, Dr. Clawson, honored guests: Welcome to New Jersey.

Rural land use policy, the subject which will be discussed during the coming days, is nowhere more timely than in New Jersey, where we have more than one million acres of prime agricultural land. As you are aware, the pressure for land conversion in the rural sections of the region have been substantial. During the past 30 years, more than one million acres of New Jersey's farmland was lost to other uses. This was the result of countless private and public decisions, some necessary and some unnecessary. The rural character of significant portions of New Jersey is an asset to the entire State. I am convinced that if our remaining farmland were lost, New Jersey would be a much less pleasant place to live.

There are no easy or pat solutions to the problem. I believe that it will be necessary to evaluate and experiment with innovative approaches if we are to achieve a more rational rural land use policy. It may be that in the process some of our traditional attitudes toward the land must be changed. It is clear that we must begin to manage land as a resource to be maintained for the benefit of this and future generations.

The urgency of the problem was recognized in New Jersey at a comparatively early date. This is understandable when one considers that we have more people and more automobiles per square mile than any other state.

I will attempt to briefly outline the actions we have implemented and some of those which are being considered.

The State has adopted legislation to protect areas of critical environmental concern. These include wetlands, floodplains, the Hackensack meadowlands, the coastal areas, and the Pinebarrens regions. The objective of these statutes is to conform land use development to the natural suitability of the area for particular uses. The experience with these approaches has been generally favorable.

Another approach involving rural areas was the "Farmland Assessment Act of 1964." This was an attempt to reduce the pressure for farmland conversion through the use of preferential tax assessment. It appears that the statute has slowed the pace of attrition, not without the creation of some tax policy questions. The tax incentive method has had some efficacy as a stop-gap measure, but it has not been successful in reversing the trend described as the "impermanence syndrome" by the Blueprint Commission on the Future of New Jersey Agriculture.

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The Blueprint Commission, ably chaired by Secretary of Agriculture Alampi, labored long and hard to develop recommendations that would insure a stable and permanent agricultural industry for New Jersey. The Commission's principal recommendation was that the State should preserve agriculture in perpetuity by purchasing development easements from the farmland owners. The fiscal and other implications of the report are currently being evaluated by various agencies of state government. The possibilities presented by this report deserve your serious consideration and evaluation.

Another proposal currently being discussed is referred to as the Transfer of Development Rights. It would provide for the distribution of development rights to all landowners within a community and require that a prescribed number of rights be purchased prior to construction of specified types of higher density uses. This proposal has the advantage of not requiring government financing, but its ability to guarantee desired results has been questioned.

It is also clear that the various activities undertaken by government may have significant effects on rural land use policy. In the past, the construction of highways was the most obvious example of this phenomenon. The construction of highways through undeveloped areas often fostered unwise land use decisions.

The environmental impact statement process and the state's shift in emphasis in favor of public transportation have had a decided effect in this area. It is likely that we will expend more capital this year on the construction of regional sewage treatment plants than on transportation systems. The land use impact of this program designed to abate water pollution has been recognized in the past few months. The federal government now requires that the sizing of the plant and the location of the interceptor sewers be thoughtfully analyzed from the land use perspective.

I hope that through this brief discussion I have been able to convey to you New Jersey's commitment to improving our rural land use policy. It should be clear that some progress has already been made and that other interesting programs are being considered but there are no monopolies on the infinite variable solutions.

I trust that conferences such as these where dedicated professionals meet together to discuss important issues and exchange ideas will assist us in defining the issues and shaping directions.

Thank you.

PROBLEMS AND POLICY ISSUES IN RURAL LAND-USE CONTROL

Marion Clawson

In the United States as a whole, but more particularly in the Northeast, land use is dominantly rural while people are dominantly urban; and therein lies the root of most of the problems of rural land-use control.

In that highly urbanized belt from Boston to Washington, that I call the Northeast Urban Complex, that Jean Gottmann called Megalopolis, and that Herman Kahn referred to as BosWash, well over 80% of the people live in urbanized areas, as the Census defines that term. Yet within this highly urbanized area, only 21% of the land in 1961 was in residential, commercial, and industrial uses or was in public or semi-public ownership. About a third of it was in farms, some of that being forested, and well over 40% was what I call "not" land -- not urban, not publicly owned, not in farms. Much of this "not" land is forested, most is owned in relatively small tracts (less than 500 acres, in most cases), and much or most of this land is used by its owners for purposes other than maximizing the annual cash returns.

If the comparisons were made for the entire Northeast, it would be still more striking -- nearly all the people resident and working in urbanized areas, yet the vast majority of the land in essentially rural uses. Some of you may have seen Fortune magazine for July, 1973. Its editor drew a line between Boston and Washington, another line 25 miles west, and sent a photographer down the western line with instructions to take pictures of rural scenes. The result is a series of striking photographs of sweeping rural vistas, with no evidence of urbanization, even from this border of the largest urbanized belt in the United States.

An undetermined but probably large proportion of the rural land area of the Northeast is owned by urban residents. However, it is a minority of urbanites who own rural land. Some rural land is owned by people resident on it or resident in a small town or rural area nearby. Much of the rural land is used, in one way or another, by people who live in urban areas. They use it for their vacations, or hunt on it, or drive through it for pleasure, or engage in outdoor recreation on it. There is often a sharp divergence in knowledge, interest, and political power between the owners of rural land and the larger total public or total electorate in the state or region. The owner of the land has a different understanding of the land,

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Marion Clawson has been Director, since 1955, of the Land and Water Program and is currently acting President of Resources For the Future, Inc., Washington, D.C.

of the relationship of people to the land, and of the problems and costs of land ownership than does the city dweller who would like to use some rural land at times and in ways of his choosing.

Public control of private use of rural land is not wholly, and probably not mostly, in the hands of people resident in rural areas. Even many counties whose land is dominantly rural have small cities with enough residents that dominant political power lies in the towns, not outside them. Counties exercise such controls over private land use as they can, but within a legal framework provided by the state, which clearly has a majority of its electorate in the cities. When we focus our attention on rural land-use control, we must be aware that the control will be greatly influenced if not determined by people resident in urban areas.

U. S. Land-Use History

The history of land use in the United States is dominated by the dual thrusts of development and of social control. The development thrust has been primarily private, but private initiative working under rules (laws) established by society. The development thrust cleared the forests and plowed the prairies to establish farms, built the cities, built the railroads and the factories, and otherwise transformed a vast land, thinly populated and economically backward, into a large, industrialized, economically powerful nation. One need not approve every developmental action, but no informed person can fail to be impressed with the enormous achievements of this developmental thrust. Equally, no informed person can ignore the continued power of the private developmental thrust -- the proposal and the action to build homes, shopping centers, office buildings, recreation spots, electric power plants, factories, and all the rest of it.

But, throughout our colonial and national history, there have also been numerous social controls over private land use. The towns of New England were established under a group- or leader-formulated land use plan, for instance. The terms on which land was made available to private owners and users, the development of transportation arteries, the foreign trade policies of the central government, the laws and regulations applicable to credit based on land or used for land development, and scores of other social or public actions constituted influences if not control over private land use. Likewise, the terms on which property could be bequeathed by an owner to his heirs were important social controls. Many of these forms of general social control over private land use continue to this day. Because they are so general, so all-pervasive, we often overlook them. It is only when one seeks to explain the American system of land ownership and land use to someone from another country that one fully realizes the extent and the effectiveness of these various social controls and influences on private land use.

But more direct public controls over land use have evolved during the past century. When "public controls" are mentioned, most people think of zoning, and especially zoning in urban and suburban areas. These are indeed important, and I shall discuss them in more detail later. But we should recognize that public or group controls over individual land use existed in rural areas before they were begun on a serious scale in cities. Drainage districts, weed control districts, and in the West irrigation

districts, had legal powers, and used them, to control use of private land. Fence laws and other laws also had marked influences on private rural land use.

Even today, many of the controls over rural land use are called something else; air and water pollution control laws and regulations, for instance, if strictly enforced may have major repercussions on private rural land use.

Social controls over private land use mostly, but not invariably, take the form of governmental laws and regulations. The government may be federal, state, county, city, or special district. The laws may be specifically designated as relating to land use, and these are generally restrictive in effect, specifying what cannot be done but providing little or no positive incentive for compliance. But some governmental influences are positive, in the sense that they provide a subsidy or other direct incentive for the private landowner to do something he would otherwise not choose to do.

Social controls over private land use may involve institutions other than general government. Banks and other lending institutions, for instance, may have regulations or standards that exert a marked effect upon private land use. I recently served as a member of a county planning group that was told (by developers who knew,) that it did not matter what we said about parking within office buildings, since no lender would provide credit for a new office building unless it contained a minimum amount of parking within the building. In many cities, lenders have refused to lend in certain areas, because they thought loans there were too hazardous, and this in turn has greatly affected the kind of private land use in those areas. And one could go on, listing other kinds of social controls, in addition to strictly governmental ones.

Equitable Basis for Public Control over Private Land Use

What is the rational and equitable basis for society as a whole - operating through some unit of government - restricting a private landowner in the use he can make of his land? Various rationales have been advanced, of which I find four, somewhat separate but somewhat overlapping, to be persuasive:

1. The existence of externalities, or effects caused by one person and felt by others who are not parties to the decision process. These externalities may be negative: the old smokestack belching out fumes on the nearby landowner, or stream pollution which affects downstream users, and others of this kind. The externalities may also be positive: my enjoyment of my neighbor's garden, or the value that accrues to my house because every other house in the neighborhood is well kept up, etc. The externality is usually not intended by the person responsible for it. He makes certain decisions, based on factors within his control and on outputs which he enjoys, but in the process there are unintended and possibly unknown consequences to others. The decision-maker neither bears the costs nor reaps the benefits of the externalities; hence he cannot take them into account in his decision-making. Society, however, may take account of such external effects, by prohibiting them, charging the decision-maker for them, or rewarding him in some way if the externalities are positive, or bribing him to stop if the externalities are negative.

2. A closely related rationale, and yet somewhat separate, is that of interdependencies. In externalities, one person is explicitly or implicitly the decision-maker, from whom flow effects, either negative or positive, on others. In interdependencies, effects flow from and to each person involved, in all sorts of pairings and other more involved arrangements. For instance, a residential neighborhood can be maintained physically and socially only by all, or nearly all, property owners and residents. Each has an effect upon the others. Each is the recipient of effects from others. The relationships are reciprocal to a degree that they often are not in an externality situation. The need for social action to control land use may arise because the bargaining among land owners and residents, pair by pair or on a larger group basis, would be too cumbersome to be practical.

3. Indivisibilities may exist; a flood protection project protects all land within its service area, not merely some land; or a drainage project drains all land within its borders, not merely some of it; or a highway serves all residents in an area, not merely those who volunteer to help pay for it; and so on. While this basis was not, so far as I know, advanced as the rationale for many of the rural land-use controls such as weed districts, it seems to me that it typically did underlay such rural land-use controls.

4. Last, social controls over private land use may have a significant measure of efficiency. It may be argued that using all land within one area for one use, and all land within another area for another use, results in more total satisfactions to landowners and users, and hence to more value of the property, than would result from intermingling both uses in both areas. In suburban areas, gasoline service stations are resisted in good residential areas, high rise apartments are resisted in single-family home areas, and so on. One of the old principles of urban land planning was the separation of activities into zones: no factories in the residential zone, no residences in the industrial zone, etc. It may well be argued that this process has gone much too far in most urban and metropolitan areas, with the resultant long-distance separation of home, work place, shopping area, school, and recreation site, resulting in far more movement of people than would be necessary in an area with more intermingled land uses. Does efficiency of rural land use require that crop farming, second homes, forestry, and recreational uses of land be separated?

Before leaving this matter of rationale for social control over private land use, it should be pointed out that mere assertion of one or more of these rationales is not proof that it exists or that it is important. The claimed efficiency may be grossly exaggerated, or the external effect of one decision-maker upon his neighbors may be small, or in fact the claimed interdependency may not exist, and so on. When these virtues of social control are claimed, they can reasonably be challenged or at least scrutinized, and if possible measured.

Means of Social Control over Private Land Use

If the total society, or a major sector of it, decides that social control over private land use is desirable (or equitable, or efficient, or whatever other reason is cited), then society has several mechanisms at its command. Most, but not all, are governmental.

In the United States, social control over private land use has mostly rested on the use of the police power -- the power to compel an individual to do something, or refrain from doing something, in the name of general public welfare. This is the basis on which land planning and land zoning have been defended, both in the professional literature and in the courts. This extends to public health considerations. If the use of septic tanks creates a health hazard in a particular situation, they may be forbidden under the police power. In the name of general welfare, activities that create air pollution hazards for downwind residents may be forbidden or required to be modified. One could go on, listing many kinds of land uses that are controlled, at least in part, by some unit of local government under its general police power.

Taxation is the means whereby society appropriates some of the private income from land use and ownership for social or group purposes. The way in which taxes are levied may considerably affect land use. It is doubtful if any tax on land and other property is without effect upon land use. The effects may not be intended. It is sometimes argued by local officials that real estate taxes, for instance, are levied on all property proportionately, with revenue-raising the only purpose, and that any effects upon land use are small and/or incidental. Purpose in affecting land use may indeed be absent, although, as one looks at some of the provisions of income tax law and their effect upon slum rental residential property, one's credulity is strained to believe that the effects were not intended.

Society, operating through government, has the power to own and manage land and to acquire land from private owners without their consent, by the power of eminent domain, if the land is to be used for a public purpose. The definition of public purpose has changed greatly over the decades. Today, for example, slum clearance will qualify, whereas once it did not. Further changes are highly probable. The role of public ownership of land in the United States is often underestimated. There seem to be people who think public ownership of land is primarily a western phenomenon. But governments at all levels own land, sometimes a lot of it, and the interrelations between government and private land may materially affect the value of the private land. In my judgment, public ownership of land will increase in the future, especially in the relatively densely settled states.

Society or its government has the power of the purse, to make direct payments to landowners to persuade them to do something society is unwilling to compel them to do. This has been the approach in agriculture for well over a generation. It is also the rationale behind many public works and public services. A road into a new area will stimulate development along it; so will the extension of a sewer line into a new area. Perhaps as important as the provision of the public service is the way in which users are charged for it. For many public services, there is no charge related directly to use -- roads, schools, even parks, sometimes sewer lines, and others. Users may pay, through their real estate or other taxes, but not at the time or in proportion to use, nor in proportion to costs incurred in providing the public service. Sewers, for instance, are often charged for on a postage-stamp basis -- no higher cost to the distantly sprawled subdivision than to the nearby one, and hence, for this reason there is no incentive to favor development of more compact suburban settlements. Were charges closely related to marginal costs, and were they imposed when the sewer service was available rather than when it was used, there would be a powerful financial incentive toward closer suburban settlement.

Society and its governments have the power to wheel and deal with private landowners, to extend or improve a street or highway if certain private investments are promised favorable action upon a zoning application if some land is donated for a park, etc. Many observers and students will deny the existence of this power, or decry its use, and surely abuses are possible. A major difficulty with wheeling and dealing is that it is likely to be under the table, with much of the benefit that should go to the public actually appropriated by some official or by some private group. But an interaction between public and private actions always exists and may be advantageous to each. A well-conceived land-use and public approvement plan, arrived at by impeccable procedures for public business, and a series of private actions taken to utilize the publicly-provided facilities, is a form of wheeling and dealing, but a morally and socially acceptable one.

These various powers are governmental, with the various measures undertaken by some unit of government. While these various powers could be used in a coordinated fashion, each greatly strengthening the other in application, in fact they have generally been used separately and hence rather ineffectively as far as land use is concerned. Real estate taxes are based upon assessed values, not upon land use zoning. The assessors are correct in saying that society, operating through elected officials, has given them no authority to recognize the zoning of the land. Public improvements have often been built without regard to, or in direct opposition to, the land-use plan. Public acquisition of land, when it has occurred, has rarely been seen as a means of furthering an overall land use plan, which in turn was strengthened by appropriate public works and taxation measures. The powers of government, particularly the powers of local government, to influence if not control use of private land are very great, but the utilization of such powers has been hit or miss, generally uncoordinated.

Society has some means of influencing if not controlling use of private land without resort to governmental action (or inaction). The willingness of lenders to extend credit in certain areas to certain classes of borrowers and for certain land use purposes may be decisive in what a landowner or would-be landowner can do with his land. Social and economic pressures can be influential in many situations.

Issues in Rural Land Use Control

An increasing population and an increasingly interrelated social and economic structure will almost surely increase the externalities and interdependencies in rural land use, and these in turn will surely lead to increased social control over private land use in the future. The trend may be rapid or slow, and I have little doubt there will be contrary movements at times, as there are eddies even in fairly fast river currents. Many people who decry or oppose public controls over private actions, as a general philosophy, will be moved to support particular social measures to protect private rights which they regard as important. My judgment is that public control over private rural land will increase considerably over the next generation. What social problems or issues does this raise?

First of all, any significant social control over private land use implies a rejection, at least in part, of the private market. If the

market by itself will produce some desired result, then there is no need for social controls. The private market for land has surely produced definite land use patterns in the past. It is only when we, as society, reject the actions of the unregulated private market that we need interpose social controls over private land use. One corollary is that social controls over private land use, if effective, will prevent some landowner from doing what he would otherwise choose to do. Unless this is true, the social controls over private land use have no rationale. They must restrain some landowner, in some way. As I have sometimes said, effective land use controls must bite someone, but who, how many, and how much? No bite, no effectiveness; too much bite, revolt, and the biter is out. A more formal way of putting this is to say that social controls over private action must always have some effective minimal level of public support. If not, the social controls will be rejected or become inoperative in some way.

If there is to be increasing social control over private land use, who will make the land use plans, by what process, on what evidential base, and who will frame the controls and enforce them? How far should plans be formulated by experts and how far by the total public? How, in fact, can the whole public be drawn effectively into the land planning process? Must land-use controls rest upon officially adopted land use plans? In fact, in the past, two-thirds of all zoning actions have taken place without benefit of a land use plan, and others have been in contradiction to it. In my judgment, land-use controls that do not rest upon a land use plan, which in turn is solidly based upon facts and analysis and which has been adopted by a competent political body under fully acceptable governmental procedures, will face increasing challenge, both legal and political, from affected groups.

How far, and in what ways, can social control over private land use respect or defer to the rights or wishes of minority groups within the population? I do not refer particularly to racial or ethnic minorities, or even primarily to economic ones, but include all groups who would like to see some other kind of land use than is permissible but simply lack the votes to put their views across. Where and how can the misfit or the oddball or even the individualist live, work, and play, if society operates on a majority basis to control private land use? Can there be, or must there be, special areas or zones for the nonconformist? If so, how large, how determined, for whom, how restricted, how changed over time, and otherwise how managed?

This can be put differently: how far can or should the wishes and the rights of the majority be thwarted by the minority, nonconforming or otherwise? We hear of the tyranny of the majority, but the tyranny of the minority may be equally serious. If a substantial majority of the people of some area, rural or urban, want a certain pattern of land use, how far is it reasonable to deny their wishes to accommodate some minority group? My observation is that much land-use control is actually minority control over the majority. The majority may not object strongly, and may even be apathetic, but if pressed would not have endorsed the actions taken in the name of the whole group. Most local planning and zoning is very much the activity of small groups within the total local electorate. Much rests on lack of active opposition rather than on consent.

How much social control over private land use will be accepted by the residents of any area, without active rebellion? There has, in fact, been

rebellion against land use controls in the past. The two previous experiments in national land-use planning - in the 1930's - ended in rejection by the political forces with power. In many local areas, land-use plans and/or zoning actions have been proposed which had substantial expert and "leader" support but which the larger electorate did not accept. Yet the larger electorate may have been dissatisfied with and disadvantaged by unrestricted private land market actions.

At what geographic scale or at what governmental level should land use planning occur and land-use controls be imposed? Traditionally, most land use planning and nearly all land use controls have been at a local level: counties and cities. But there is an increasing pressure to have states and the federal government play a larger role. Local planning may serve local ends, but the sum of local plans may be a poor regional or state plan. But planning and land controls by states or federal government have serious weaknesses too. My judgment is that the locus of land planning and land-use control will gradually shift up the governmental ladder and will increasingly be exercised over larger areas.

As social control over private land use spreads into more rural areas, and as its terms become stricter, we may see many interesting political and social battles develop. Rural land use planning and control will surely become the "art of the possible" - which is what politics is supposed to be.

A BASIC INTRODUCTION TO LAND USE CONTROL LAW AND DOCTRINE*

E. F. Roberts

I. GENESIS OF THE ZONING MECHANISM

> "No one in America feels any great concern for protecting agricultural land from urban development."
>
> DEFALONS, LAND-USE CONTROLS IN THE UNTIED STATES 9 (1962)

A. ZONING - A BY-PRODUCT OF URBANIZATION.

Early American settlements were planned communities.[1] In the Massachusetts Bay Colony, for example, the colonial farmers lived within a built-up village and daily went out to the fields that surrounded this cluster of housing. Most villages centered on a common, and the house lots were arranged around it on the basis of a squared grid. It was not unusual to find provisions that required housing to be set back a prescribed distance from the street line. More interesting still, these colonial schemes envisaged a limited population, the assumption being that, when the village as planned filled up, the time had arrived to found an entirely new settlement elsewhere for the overspill.

Even though New England began as an agricultural society, economics shortly triumphed over tradition, and these neatly planned new towns disappeared. When (in 1776) Adam Smith published his Wealth of Nations, commercial society had begun to replace agricultural society in the Anglo-Saxon countries. Trade and commerce appeared to offer more rapid routes to wealth than farming, and people active in trade and commerce began to co-opt the town proper, while the farmers began to locate their homesteads on the sites of their particular acreages. The price structure of land calculated in terms of its strategic urban location was beginning to influence the life-styles of the various callings. In the process, the villages grew into towns, and haphazard construction all but obscured the original design of most American centers of habitation.

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No sooner, moreover, had Adam Smith purported to define the rules that governed the market place than commerce based upon cottage industry began to be replaced by the factory system. Arkwright's spinning frame - the starting point in the history of mass production - was invented in 1770. The iron foundries began to appear around 1780. Thereafter towns began to spring up not on the basis of pure chance but in response to a calculus involving the coalescence of raw materials, fuel, transportation, and labor supply. Pittsburgh, for example, is the net result of commercial ingenuity applied to a place where there co-existed a river system, a coal supply, available ore, and immigrant labor.

Pittsburgh can be envisaged, then, as a product of human genius and resource topography. Yet it was operating out of New York City that J. P. Morgan was able to assemble the capital necessary to create the mammoth United States Steel Corporation in 1901. Improved communications technology - the telegraph, the telephone - enabled a new breed of entrepreneurs to locate their corporate headquarters in the city where there had developed a unique market in the most essential commodity of all: money. Dependent upon capital-intensive technology, industrial capitalism gave rise to its own bureaucracy located in Manhattan near the banks and stock markets which provided this essential resource. Office buildings housing this white-collar work force became common fixtures. Given the widespread perceived need to be by the financial centers, and the resultant escalation of the price of appropriate land, the urge to build up into the sky developed. As chance would have it, another series of technological advances opened the door to the trend to develop vertically.

High buildings made no sense at all until the elevator was perfected into a reasonably efficient and safe system of vertical ascent, and until high-pressure heating and plumbing systems were developed to service their upper floors. No skyscraper was plausible if it required recessing walls of solid granite to support itself, both because of the cost of construction and the vast lots needed if the ground floor was going to have any floor space at all. Once steel could be fabricated into a skeleton and cement could be poured over this matrix to serve as a mere skin enveloping the structure, then indeed the sky became the limit. Thus, a number of practical engineering breakthroughs coming to fruition across a broad spectrum around the year 1900 opened the way for an increase in skyscrapers in center cities. Indeed, by 1913 Manhattan could boast of some fifty buildings that rose more than twenty stories and nine more that exceeded thirty stories.

The trend to build upward proved to be a mixed blessing. It did utilize most efficiently scarce and expensive horizontal space, but it tended to convert the streets below into dark canyons. Before the science of artificial lighting was perfected, moreover, daylight and windows were vital. Hence, whenever A constructed a skyscraper on his parcel, he placed his neighbor B in a quandary. On the one hand, B's old building might be overcast by a shadow for most of the day and its value thereby decreased. On the other hand, if B built a skyscraper on his parcel close to A, one wall might have nearly useless windows and, perforce, the building would not draw tenants as efficiently as otherwise would be the case. In any event, it dawned upon some property owners that the first entrepreneur to build a skyscraper tended to inflict harm upon his immediate neighbors, albeit nuisance-law-wise this was, as we shall see, damnum absque injuria.

At the same time, subways were beginning to criss-cross Manhattan. Would-be builders of skyscrapers tended to locate their new towers near subway terminals so that the labor force would be attracted to the site by the convenience of travel thereto and therefrom. Even worse, the garment makers were beginning to locate their lofts downtown to cut their delivery costs once the subways made it possible for them to bring their labor from the tenement slums to the factories. All of this "progress" had little appeal to Fifth Avenue merchants who purveyed luxuries to the rich. A gloomy canyon lined by skyscrapers did not match their image of what an exclusive shopping area should be. Streets overrun morning, noon, and afternoon by commuting hordes of relatively grubby workers did not particularly amuse them either, although a subway terminal nearby did catch their interest[2]. Determined as they were to "preserve property values", these merchants banded together under the aegis of the Fifth Avenue Association to lobby at City Hall for relief[3].

B. COMMON LAW LAND USE CONTROLS.

Surveying the jurisprudential scene circa 1900-1930 must have been a somewhat disheartening experience for anyone interested in planning. The only remedy provided by the law in the instance of conflicting uses of land was by way of nuisance law, and this particular body of learning was, as it still is, in a state of deplorable disarray. It was clear, however, that ever since the Wars of the Roses there had existed the potential for someone to decide to raise pigs in a neighborhood wherein everyone else maintained a polite residence. While this did not involve a trespass, since no physical invasion of neighboring property occurred, the courts early had fashioned a writ whereby outraged neighbors could seek a judicial order requiring their innovative neighbor to cease causing odors to permeate the neighborhood[4]. Even so, so complicated were the pleadings in this particular action that, when the courts permitted a money action for damages as well[5], everyone resorted to lawsuits for damages in lieu of abatement[6]. Ultimately, when the antipathy to equity courts subsided, inspired as it had been by association with royalist Star Chamber, American equity jurisprudence evolved and began to take cognizance of nuisance suits and to issue injunctions[7].

1. The Limits of Nuisance Law.

Nuisance law, however, crystallized into a certain pattern that tended to countenance noise-making and smoke-making activity in urban centers which in more genteel areas would be abated at the drop of a hat[8]. At the same time, nuisance law came to demand that the defendant's behavior on his land cause smoke, noise or odor to invade plaintiff's parcel, if there was to be a remedy[9]. Crowds using the public streets were beyond the ken of nuisance jurisprudence, as were the cases in which someone built a skyscraper that cast his neighbor into perpetual darkness[10].

a. Private Nuisance Law.

These disputes between adjacent landowners, in which a plaintiff sought to have enjoined behavior which unreasonably interfered with his enjoyment of his estate, were collected under the caption "private nuisance law." While these were nothing more than tort cases, they did tend to serve as a primitive zoning tool since, by and large, industrial activity was enjoined as unreasonable behavior in suburban residential areas, while it

was licensed as eminently reasonable in urban centers[11]. Only recently has it been recognized that this de facto licensing of nuisance-style activity in urban areas actually contributed to the despoliation of the environment in those areas so that, perforce, this body of law has of late been subjected to a searching re-examination of first principles[12].

b. Public Nuisance Law.

More directly relevant to our story here were the related cases collected under the caption of "public nuisance." These nuisances were crimes[13], the list of offenses having accumulated in England case by case[14], although the American style dictated an effort to reduce the list to a statutory prohibition[15]. By and large, these crimes consisted of offenses such as maintaining the likes of gun powder factories or rendering plants in built-up areas. Perforce, this body of law was also a primitive form of land-use planning since it tended to exile to the hinterlands uses that threatened the comfort and safety of the public in general[16]. As will shortly become apparent, public nuisance law was to have a direct influence upon the emergence of zoning law.

C. THE IDEA OF PRIVATE PROPERTY AS A RESTRAINT UPON LAND-USE LEGISLATION.

It is crucial to realize that while actual nuisances were subject to abatement, American jurisprudence otherwise treated the owner of a parcel of land as pretty much absolute sovereign over his dimunitive domain. This is perfectly illustrated by the way the Colorado court reacted to an early land-use control scheme devised in Denver just before the outbreak of the 1914-1918 War[17]. In the residential areas of Denver it ceased to be possible to qualify for a permit to build either an apartment house or a store unless the applicant filed with the building inspector the signatures of the majority of the property owners in the area immediately concerned, together with a certificate by a reputable abstract company evidencing that the signatories actually were the owners. Even with the requisite signatures in hand, the would-be developer had to agree in writing to conform to the average setback in vogue in the area. A landowner resorted to mandamus (court order) against the building inspector to obtain a permit without complying with this new scheme. He was successful because, according to the judges, this scheme deprived the applicant "of the fundamental right to erect a store building upon his lots covering such portions thereof as he chooses."[18]

1. State and Federal Constitutional Issues.

This reaction is to be explained because the exercise of legislative authority to regulate land use entails the exercise of the police power. It is axiomatic, of course, that the state as sovereign has the inherent authority to make laws designed to protect the public safety, public health, morality, peace and quiet, and law and order. Indeed, it has recently been observed that, relative to the police power, "An attempt to define its reach or outer limits is fruitless."[19] So far-reaching is the police power, of course, that obviously a society premised on less than parliamentary absolutism must have recourse to somewhat intractable constitutional norms designed to set some guidelines limiting the scope of this inherent authority. As a result, in this country, certain constitutional restraints function at both the state and federal level.

State constitutions, first of all, tend to differ radically from the federal charter. Simply put, whereas the Constitution is largely a list of "do's," state constitutions tend to be an inventory of "don'ts."[20] The whole theory of the national charter, after all, was symbolized by the Tenth Amendment dogma that all powers not expressly granted to the central government were reserved to the several states. As a result, the federal charter, given the prevailing notion of severely limited powers, could consist of a relatively simple inventory of matters with which the central government could concern itself. Conversely, this left the state legislatures authorized to exercise the now-defined totality of sovereign power not exclusively delegated to the central government. Given the Revolutionary War ethic that government should be severely circumscribed, this necessitated drafting state constitutions that set limits around the inherent authority of the state governments.

After the Civil War, of course, the legislative authority of the states was further circumscribed by the imposition of the Fourteenth Amendment's command that no "State [shall] deprive any persons of life, liberty or property, without due process of law." Aggrieved citizens now had recourse, if the state constitution did not protect them, to the federal courts. Thus it was that the police power, the general authority of any sovereign to legislate, came to be defined for due process purposes in terms of health, safety, morals, and general welfare[21]. These were ends toward the protection of which the exercise of legislative authority was justified. Even so, the means adopted to achieve these ends had to be reasonable ones. For example, a state legislature might require everyone to be vaccinated to protect the public health. It could not, however, require that the vaccine be applied with a hot branding iron when a simple scratching technique would suffice[22].

Observe now that the Colorado court condemned the Denver scheme on both state and federal constitutional grounds. State-wise the scheme was seen to contravene a local constitutional provision guaranteeing Colorado citizens the "natural essential and inalienable 'right' of acquiring, possessing, and protecting property."[23] At the same time it contravened due process because a "store building is in no sense a menace to the health, comfort, safety or general welfare of the public; and this is true whether it stands upon the rear portion of the lots upon which it is erected, or is constructed to the line of the street."[24] The measure thus exceeded the parameters of the police power; it "would clearly deprive him of his property without compensation"[25] and, perforce, it was confiscatory.

D. APPROACHES TO THE CITIES' PROBLEMS.

1. The Perceived Need for Setbacks, Height, and Use Limitations.

To return to our story about the efforts of the Fifth Avenue Association to rationalize land-use patterns in New York City, the Board of Estimate and Apportionment was persuaded in 1913 to create an Advisory Commission on the height of buildings. This it did at the behest of George McAneny, lawyer, journalist, leading light of the City Club, and borough president of Manhattan. Chairman of the Commission was Edward M. Basset, lawyer, self-made man, and pioneer planner. Both men were friends, loved the city, and were what we would call "reformers."[26] The report of this commission indicated that merely setting limits on the height of buildings

was not the answer to Manhattan's problem; rather, a system of setting back upper levels pyramid-style was more appropriate. More significant still, the commission concluded that controls had to be imposed upon the uses to which land was put in different parts of the whole city.

In this second conclusion lay the rub. The height of buildings might be regulated, because such regulations, even when motivated by aesthetic considerations, could be justified in terms of safety because building technology threatened to outpace the capacity of fire-fighting equipment to deal with conflagrations in the new skyscrapers[27]. Prohibiting a man from constructing a store in a residential district, however, raised the spectre of unconstitutionality, witness the contemporary Colorado experience[28]. Counterpoint to Denver, however, was provided by Los Angeles, where certain buildings and uses were excluded from residential districts[29]. The difficulty was that the excluded uses in Los Angeles included such a litany of stone-crushers, rolling-mills, carpet-beating establishments, fireworks factories, and soap factories that this legislation appeared to be little more than a traditional public nuisance prohibition.

2. Eminent Domain Rejected as a Strategy.

For a time it would appear that the proponents of zoning thought of conceding the merit of the Colorado response and, in lieu of proceeding in terms of the police power, considered invoking the power of eminent domain[30]. Control of land use could be achieved, after all, by condemning the owner's right to put his property to a different use than it had at the time the enactment went into effect. The costs would have been enormous, and the administrative headache of such a scheme, entailing as it would individual awards to each owner, put people off. Interestingly enough, in 1913 it would have been questionable whether eminent domain would have been available as an alternative device, since the due process line of authority restricted the states to taking property only if it was to be put to a public use[31]. It wasn't until 1916 that the Supreme Court through Mr. Justice Holmes rejected this doctrine in favor of a broader one authorizing takings to achieve a public advantage[32]. By then, however, the protagonists of zoning had rejected the condemnation approach on practical grounds[33]. Déjà vu, the condemnation approach has recently become a lively topic of concern to land-use planners[34].

3. Surmounting Constitutional Limitations.

Having concluded that the imposition of land-use controls by way of the exercise of eminent domain was impractical, the proponents of controls still had to face the objection that the imposition of such controls through the aegis of the police power would be declared unconstitutional as tantamount to a taking of property without the payment of just compensation. Apart from nuisance law cases, after all, ownership of real property included the unfettered right to develop it, and zoning would clearly impinge upon the free exercise of these development rights. Coincidentally, however, in 1915 the Supreme Court decided a case which evidenced a judicial inclination to allow society to impose remarkable costs upon a landowner in the name of regulations designed to improve the general welfare.

a. A Helpful Precedent.

Hadachek v. Los Angeles[35] was really a public-nuisance-style case.

The gist of the controversy was that Los Angeles had annexed territory in order to expedite residential expansion. Included in this new territory was land upon which petitioner was manufacturing bricks on the site of a rich clay deposit. Los Angeles then outlawed the manufacture of bricks within the city limits, a relatively conventional measure designed to protect its inhabitants from noxious trades that were better suited to remote areas. In this case, however, the petitioner had begun his trade in the hinterlands in the first place and the enactment of the measure at this time meant shutting down petitioner in order to expedite building on the area. True, petitioner could cart his clay farther out into the hinterlands, manufacture bricks there and cart the finished product back into the city again, but the transportation costs would render his business uncompetitive. Petitioner was threatened with seeing an $800,000 manufacturing parcel reduced in value overnight to $60,000 worth of land suitable only for residential development. It was little wonder that the case came before the Supreme Court by way of a habeas corpus proceeding, because petitioner went to jail rather than comply with the new scheme. Even so, the Court sustained the measure, remarking that "There must be progress, and if in its march private interests are in the way, they must yield to the good of the community."[36]

b. Zoning Legislation Enacted.

Bolstered by this opinion, the reformers went ahead with their scheme to divide the City of New York into districts and to regulate therein the location of trade and industry. The Board of Estimate appointed a second commission to recommend the boundaries of districts and appropriate regulations to be enforced therein. Ultimately this second commission, under Bassett's chairmanship again, concocted the zoning resolution which was finally enacted by the Board of Estimate in 1916. Thus it was that Fifth Avenue's parochial problem led to the enactment of the first comprehensive zoning ordinance in the United States. More important, American land-use controls had been cast in the regulatory mold, a decision that was to influence the development of those controls even up to today[37].

E. EARLY PROBLEMS OF ZONING LEGISLATION.

1. The Need for Enabling Legislation.

It is crucial to note that as part of the process of zoning New York City it was necessary to obtain enabling legislation from the state legislature in Albany[38]. Cities, towns, and villages are "municipal corporations" and possess only the authority granted them in charters bestowed by the state[39]. Apart from the federal question whether zoning accords the citizen due process of law, there always coexist two fundamental local issues of law: has the local unit of government been authorized by the state to zone in such and such a fashion[40], and does the state constitution itself sustain the notion that the state legislature possesses the requisite authority to bestow such powers upon constituent units of government?[41] These are elementary considerations, but being so elementary, they are easily overlooked, with disastrous results.

2. The Need for State Court Approval of the Idea.

New York's highest court had in short order to decide whether the zoning notion was constitutional. The judges had no problem at all.

> "In a great metropolis like New York, in which the public health, welfare, convenience and common good are to be considered, I am of the opinion that the resolution.... was a proper exercise of the police power. The exercise of such power, within constitutional limitations, depends largely upon the discretion and good judgment of the municipal authorities, with which the courts are reluctant to interfere. The conduct of an individual and the use of his property may be regulated."[42]

Thus, granted that the enactment in question "simply regulates the use of property", "does not discriminate between owners", and "is applicable to all alike", the zoning resolution was an appropriate exercise of the police power[43].

F. WIDESPREAD ADOPTION OF ZONING

Once the zoning resolution was promulgated in New York City, the zoning idea spread like wildfire across the country[44]. In 1920, for the first time more Americans lived in urban than rural areas. By 1920, moreover, thirty-five cities had enacted zoning ordinances. By 1926 that number had mushroomed to 591, and by 1932 the figure reached 1236. As early as 1921, moreover, Secretary of Commerce Herbert Hoover caused to be created an advisory committee which issued a Standard State Zoning Enabling Act, the first edition of which in 1924 sold 50,000 copies[45]. Zoning appeared to have "arrived", and cases sustaining the constitutional propriety of the mechanism began to accumulate.

G. JUDICIAL OBSTACLES STILL REMAINING.

Appearances were deceptive. There did exist an undertow of decisions by state tribunals which, reminiscent of the Colorado court, were not persuaded that the exclusion of a grocery store from a residential neighborhood had anything to do with bettering the health, safety, morals, and general welfare of the community[46]. More crucial still, the Supreme Court of the United States had not decided whether the zoning mechanism accorded the citizen the due process of law guaranteed him by the Fourteenth Amendment. Particularly crucial now was going to be the attitude of the nation's highest court to any device that inhibited the rights of a real property owner.

A careful reading of the New York court's language quoted above should strike the reader as a typical exegesis in judicial restraint. But this is the point. The contemporary Supreme Court was the tribunal that had emasculated much of the state efforts at social legislation by reading its own substantive notions of <u>laissez faire</u> into the due process clause of the Fourteenth Amendment[47]. This was the same court which in the early days of the New Deal would yet wreak havoc with the federal effort to regulate the economy by giving an unnecessarily broad sweep to the Tenth Amendment[48]. Ultimately, of course, this was to lead to a tremendous row, after which the court did beat a strategic retreat and, at least for a time, the doctrine of judicial restraint became the established canon[49]. As it was, however, zoning was to be tested before the unreconstructed Court.

1. Euclid v. Ambler Realty Co.

The battle lines were drawn in the miniscule village of Euclid, Ohio, then a satellite community to the east of Cleveland. Euclid Avenue ran across the village from west to east, and at that time it was a tree-lined thoroughfare largely given over to residential use. Even so, the expansion of Cleveland and the increasing traffic along the avenue was already seeing the western end of the street evolve into a strip development of garages and convenience stores. Unless the community did something, the handwriting was on the wall, and ultimately Euclid Avenue would lose its traditional character. Thus it was that the village opted for a zoning ordinance which, by and large, restricted the land on either side of Euclid Avenue to residential use while, at the same time, it allowed industrial development along the railway tracks that paralleled the avenue farther to the north. The zoning scheme was designed, then, to channel development, allowing for industry while preserving the residential character of traditional segments of the village. The difficulty was that the plaintiff owned a parcel of land on the north side of Euclid Avenue, on the Cleveland side of the village. So deep was his parcel, as a matter of fact, that it was zoned for duplex residences along the avenue, for apartments farther back and then, finally, for industry along the railways. Had the land gone unregulated and the ribbon development of Euclid Avenue gone on as expected, the southern portion of the parcel would have continued to be worth $10,000 an acre. What with zoning restricting future development to residential uses, the same area was worth only $2,500 an acre.

The Ohio courts had sustained the validity of zoning in principle, but the owner of this parcel entered the federal court system to press his claim that this ordinance was unconstitutional because it amounted to a taking of his property without due process of law. Plaintiff was successful in the lower court so that the burden devolved upon the village authorities to carry the argument into the Supreme Court. There the case was argued twice. Ultimately, a majority of the justices sustained the validity of the ordinance and, perforce, the constitutional propriety of the zoning mechanism. Indeed, the result in this benchmark case may have been a nearer-run thing than was recognized at the time. This was so because it has since been reported that Mr. Justice Sutherland was writing the majority opinion which would have struck down the scheme when informal chats with the dissenters "shook his convictions and led him to request a reargument after which he changed his mind and the ordinance was upheld."[50]

In order properly to appreciate the development of zoning law one must pay particular attention to the dialectic employed by the Court in Village of Euclid v. Ambler Realty Co.[51] because this decision was the intellectual "open sesame" to land-use planning in this country. The idea that local governments could limit the height of buildings was sustained on the basis, inter alia, of Welch v. Swasey. That case had justified such limitations in terms of safety because the theoretical height to which buildings could be erected threatened to outstrip the capacity of contemporary firefighting technology to deal with conflagrations on their upper levels. The idea that nonresidential uses could be excluded from residential neighborhoods was seen as merely a natural progression from traditional nuisance-law theory which had always abhorred "a right thing in the wrong place,--like a pig in the parlor instead of a barnyard."[52] What is more, these new controls were justified in terms of health and safety.

Industry threatened a residential area with conflagration and heavy traffic. Parasites and near nuisances anyway, apartment houses blocked out the sun so as to destroy the healthful environment on residential-area playing fields, while the traffic they generated was a potential menace. Stores, moreover, only invited idlers and loiterers, when they did not breed rats, mice, fleas, and ants. Thus, in terms of a reasonable tool calculated to protect the public health, safety, and morals, the zoning idea was narrowly sustained as a reasonable exercise of the police power and then only in response to the need to protect private property from the harm unpolicied development should cause it[53].

2. The Courts' Rationale.

Observe carefully how the Court rationalized zoning in terms of health, safety, and morals rather than from the broader perspective of a device designed to better the general welfare. This was typical of the approach taken by the justices at this particular time, bent as they were to checkmate legislative violations of the then-jurisprudentially sacrosanct notion that an unfettered market economy is the best litmus of right decision-making. Ultimately, of course, the caption, "general-welfare," was recognized again as a distinct end justifying the exercise of the police power[54]. As we shall see, this change was to broaden considerably the scope of the authority to zone, although until then the law reports were to contain their ration of sardonic humor as the judges struggled to fit zoning into the trinitarian litany of health, safety, and morals[55].

It has been observed that while zoning reached puberty along with the Stutz Bearcat and the speakeasy, and then shared the stage with F. Scott Fitzgerald and the Lindy Hop, zoning alone has survived unto this day wherein it remains viable still as the basic land-use planning device[56]. Even so, it must not be thought that like Mortmain, zoning caused "progress" to stand still. Rather, zoning has tended to channel development into relatively orderly patterns. Even so, it is said that an auto-body works recently occupied the site contested so bitterly in the Euclid case[57]. It is a fact that skyscrapers have continued to be built even higher, so much so that they again present a fire hazard, the original threat that justified imposing public regulations on the development of urban property in the first place[58]. Peculiarly enough, while zoning was devised as an answer to urban problems, it has become an integral device in the structure of suburban society[59]. If this were not enough, the ultimate paradox may have been reached when in 1970 the lead editorial in The New York Times bemoaned the fact that:

> "By definition, Fifth Avenue is that elegant, glittering, sophisticated artery that is the retail heart and shopping showcase of New York. News of the sale of Best & Co's building to developers for the construction of a new office tower opens the prospect for similar deals along the street. Like the other avenues, Fifth Avenue is to be turned into bland blocks of banks sleekly embalmed in a corporate pall."[60]

Thus it is that anyone concerned with the zoning mechanism must treat very seriously the admonition of Marcus Aurelius that "All things are now as they were in the day of those whom we have buried."

References cited in Part I

1. See particularly REPS, THE MAKING OF URBAN AMERICA, ch. 5 (1965).

2. NEW YORK CITY COMM'N ON BLDG. DISTRICTS AND RESTRICTIONS, FINAL REPORT 21-23 (1916):

> "While economic forces are quite effective in securing the segregation of the heavier type close to the water and rail terminals...light industries are scattered...One good residential section after another has been progressively invaded and destroyed by the coming of the sporadic factory....
>
> In the side streets along the lower portion of Fifth Avenue the number of employees is so great that the surrounding streets are congested...At the noon hour when the workers come out from the factories for a stroll along Fifth Avenue they monopolize the sidewalk to the exclusion or serious inconvenience of those having business on the avenue...."

See also BASSETT, ZONING 23-26 (1940).

3. DEFALONS, LAND-USE CONTROLS IN THE UNITED STATES 20 (1962).

4. See generally J. & H. JOYCE, LAW OF NUISANCES 520-521 (1906); McRae, "The Development of Nuisance Law in the Early Common Law," 1 U. FLA. L. REV. 27, 43 (1948).

5. Cantrel v. Church, Cro. Eliz. 846, 78 Eng. Rep. 1072 (Ex. 1601).

6. 3 BLACKSTONE, COMMENTARIES 222 (9th ed. 1783).

7. E.g., Hutchins v. Smith, 63 Barb. 251 (N.Y. Sup. Ct. 1872); Davis v. Lambertson, 56 Barb. 480 (N.Y. Sup. Ct. 1868).

8. Compare McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907) (use of bituminous coal enjoined in Saratoga residential area) with Bove v. Donner-Hanna Coke Corp., 236 App. Div. 37, 258 N.Y. Supp. 229 (4th Dep't. 1932) (air polluting coke ovens not nuisance in Buffalo industrial area despite harm to neighboring home). For a discussion of these cases see Roberts, "From Common Law Logic-Chopper to Land-Use Planner: Eulogy for the Lawyer as Social Engineer," 53 CORNELL L. REV. 957, 970-974 (1968).

9. William Aldred's Case, 9 Co. Rep. 57, 77 Eng. Rep. 816 (K.B. 1611).

10. Fountainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla. 1959), illustrates quite neatly the American principle that, absent some contractual or statutory obligation, a landowner has no legal right to the free flow of light and air across the adjoining land of his neighbor. Thus the Eden Roc Hotel was built on the parcel of land directly north of where the Fountainebleau Hotel already stood fronting on the Atlantic Ocean in Miami Beach. Soon thereafter, work began on the Fountainebleau site looking forward to an addition which

would occupy the north side of that site and which would run along the property line with the Eden Roc Hotel for almost its entire length. Some simple mathematical computations soon revealed that this new construction when completed would during the winter cast a shadow over the Eden Roc site for the rest of the day commencing shortly after noon. No more would the sun shine after morning on the Eden Roc's cabana, swimming pool and sunbathing areas during the peak months of the tourist season. The Eden Roc's owners were unable to obtain an injunction stopping the construction work because "where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action...even though it causes injury to another by cutting off the light and air and interfering with the view." Id. at 359.

11. " [J] udicial zoning...carried out on a sporadic, hit or miss basis." CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 292 (1962). See also Beuscher & Morrison, "Judicial Zoning through Recent Nuisance Cases," 1955 WIS. L. REV. 440, 442.

12. Thus, nuisance law today is being looked at anew through the prism of "Environmental Law." See, e.g., Juergensmeyer, "Control of Air Pollution Through the Assertion of Private Rights," 1967 DUKE L. J. 1126.

13. Schiro v. Oriental Realty Co., 272 Wis, 537, 76 N.W.2d 355 (1956). Cf. City of Miami v. City of Coral Gables, 233 So. 2d 7 (Fla. 1970).

14. E.g., R. v. White & Ward, 1 Burr. Rep. 333, 97 Eng. Rep. 338 (K.B. 1757).

15. E.g., UTAH CODE ANN. § 76-43-1 (Supp. 1971): "Whatever is dangerous to human life or health, and whatever renders soil, air, water or food impure or unwholesome, are declared to be nuisances and to be illegal, and every person...having aided in creating or contributing to the same...is guilty of a misdemeanor."

16. See generally ROBERTS, LAND USE PLANNING: CASES AND MATERIALS, Ch. 3 (1971).

17. Willison v. Cooke, 54 Colo. 320, 130 P. 828 (1913).

18. Id. at 328, 130 P. at 832 [Emphasis added] .

19. Per Douglas J. in Berman v. Parker, 348 U.S. 26, 32-33 (1954).

20. NEW YORK (STATE) TEMPORARY STATE COMM'N ON THE CONSTITUTIONAL CONVENTION, INTRODUCTORY REPORT: 1967 CONVENTION ISSUES 15 (1966):

> "There is an important difference, however, between the federal government, whose powers are essentially confined to those granted by the states in the federal constitution, and the state government, which has all the sovereign powers not denied it by the federal constitution. A state constitution need not be concerned so much with the grant of powers to the state as with the restrictions the people wish to impose on the exercise of those powers. [Emphasis in original] ."

21. See, e.g., COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 507 (1868) (police power designed to insure "the comfort, safety, or welfare of society").

22. See Shelton v. Tucker, 364 U.S. 479 (1960).

23. Willison v. Cooke, 54 Colo. 320, 329, 130 P. 828, 832 (1913).

24. Id. at 328, 130 P. at 831.

25. Id. at 330, 130 P. at 832.

26. MAKIELSKI, THE POLITICS OF ZONING 9-10 (1966).

27. Welch v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907), aff'd, 214 U.S. 91 (1909).

28. See Willison v. Cooke, 54 Colo. 320, 130 P. 828 (1913), discussed supra at Ns. 23 et seq.

29. Ex parte Quong Wo, 161 Cal. 220, 118 p. 714 (1911).

30. BASSETT, ZONING 26-27 (1940): "Many eminent lawyers declared that zoning as proposed was a taking of property and not merely a reasonable regulation...."

31. See, e.g., Shasta Power Co. v. Walker, 149 Fed. 568 (N.D. Cal. 1906): Bloodgood v. Mohawk & H.R.R., 18 Wend. 9 (N.Y. 1837). Contra, Jacobs v. Clearview Water Supply Co., 220 Pa. 388, 69 A. 870 (1908).

32. Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916).

33. BASSETT, ZONING 27 (1940): "This would mean a laborious and expensive proceeding for almost every parcel of land...The method would be clumsy and ineffective." Even so, eminent domain was used to some extent in other parts of the country. E.g., City of Wichita v. Ware, 113 Kan. 153, 214 P. 99 (1923). See also City of Kansas City v. Kindle, 446 S.W. 2d 807 (Mo. 1969).

34. See, e.g. Reps, Pomeroy Memorial Lecture: "Requiem for Zoning," in BERGER, LAND OWNERSHIP AND USE: CASES, STATUTES, AND OTHER MATERIALS 823 (1968).

35. Hadacheck v. Los Angeles, 239 U.S. 394 (1915).

36. Id. at 410.

37. DELAFONS, LAND-USE CONTROLS IN THE UNITED STATES 15 (1962):

> "This decision determined the direction and limits of planning controls in America. The controls had to be such as would not justify compensation to individual owners, and they must bear a clearly demonstrable relation to the public health, safety or welfare."

38. BASSETT, ZONING 27 (1940): "The State legislature is the repository of the police power. The enabling act for zoning is the grant of this power to municipalities for regulating the height, area, and use of buildings, and the use of land."

39. ANTIEAU, MUNICIPAL CORPORATION LAW, Ch. VII. See also Delogu, "Beyond Enabling Legislation," 20 ME. L. REV. 1 (1968):

> "Although most state legislatures grant to local governments in broad language authority to deal with matters normally thought to be encompassed by the police power, these grants of authority have seldom been judicially interpreted to permit such measures as zoning, subdivision control, and official map ordinances."

40. E.g., Hiscox v. Levine, 31 Misc. 2d 151, 216 N.Y.S. 2d 801 (Sup.Ct. 1961) (cluster zoning not authorized by enabling legislation).

41. Ignaciunas v. Town of Nutley, 99 N.J.L. 389, 125 A. 121 (1924) (legislature itself did not then have the authority to license municipalities to exclude grocery stores from residential neighborhoods). See BASSETT, ZONING 16 (1940):

> "It was not until the constitution of the state was amended by a specific declaration in favor of the lawfulness of zoning that the courts of New Jersey upheld use zoning." See also id. at 18-19.

42. Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 317, 319, 128 N.E. 209, 210 (1920).

43. Id. at 318, 128 N.E. at 210.

44. See the statistics collected in DELAFONS, LAND-USE CONTROLS IN THE UNITED STATES 23 (1962).

45. Id. at 24; BASSETT, ZONING 28-29 (1940).

46. E.g., Ignaciunas v. Town of Nutley, 99 N.J.L. 389, 125 A. 121 (1924).

47. E.g., Lochner v. New York, 198 U.S. 45 (1905).

48. See, in order, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936).

49. See particularly Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (concurring opinion).

50. McCormack, "A Law Clerk's Recollections," 46 COLUM. L. REV. 710, 712 (1946). For another version of the story see METZENBAUM, THE LAW OF ZONING 54-61 (2d ed. 1955). Whatever the real story may have been, it was unusual to see Mr. Justice Sutherland author an opinion from which Justices Van Devanter, McReynolds and Butler dissented. For a somewhat less than objective summary of the characters then sitting on the Court, see RODELL, NINE MEN, Ch. 7 (1955).

51. 272 U.S. 365 (1926).

52. 272 U.S. at 388.

53. E.g., DELAFONS, LAND-USE CONTROLS IN THE UNITED STATES 18 (1962):

> "It is a very significant fact that the American system of regulating private development--"zoning"--is a legacy of the 1920's, the heyday of free enterprise."

Consider, however, (id. at 23):

> "[I]t was as a means of strengthening the institution of private property in the face of rapid and unsettling changes in the urban scene that zoning won such remarkable acceptance in American communities."

54. Infra at n. 49.

55. E.g., McCarthy v. Manhattan Beach, 41 Cal. 2d 879, 264 P. 2d 932 (1953) (prohibition against beach-front homes set on piles sustained, inter alia, lest at night obscure area under the houses invite fornication).

56. BABCOCK, THE ZONING GAME 3 (1966).

57. HAAR, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE AND RE-USE OF URBAN LAND 174 (2d ed. 1971).

58. The design of new high-rise office buildings in Manhattan, for example, built as they are without windows which can be opened, causes occupants trapped above a fire to suffocate. See, e.g., N.Y. Times, Jan. 17, 1971, VIII, 1:1.

59. See particularly Stephenson, "Zoning, Planning and Democratic Values," in ZONING FOR MINIMUM LOT AREA 49-59 (2d ed. Stephenson, 1961).

60. N.Y. Times, Oct. 15, 1970, 46:1.

II. A BASIC OUTLINE OF ZONING AS A SYSTEM

> "[T]he zoning system simply refers to those behavior patterns and actors which have been associated with each other because of their tie to zoning as public policy."
>
> MAKIELSKI, THE POLITICS OF ZONING 4 (1966).

A. INTRODUCTION.

Zoning is best appreciated as a process, involving as it does the activity of the local governing body which promulgates the ordinance, the administrative agencies which oversee the operation of the system and, perforce, their interaction with the owners of real estate subject to the scheme. Thus, at this point, it may be helpful to posit a typical zoning arrangement cast in a traditional mold. Such a tactic not only serves as an efficient introduction to zoning but provides a base upon which to adumbrate the many permutations which have recently appeared on the zoning scene.

B. THE ZONING ORDINANCE.

1. The Concept of Use Districts.

Fundamental to zoning is the idea that the community can be divided into districts in such a way that the landowners in each district will use their parcels in a harmonious way. In its rudimentary sense, zoning is really a prophylaxis against nuisances. Concomitantly, the early desire for order reflected a bias, derived from nuisance law, for maintaining tranquility in residential neighborhoods[1]. Thus it is that the most exclusive districts were and still are the single-family home districts, typically coded on zoning maps as "R-1 districts." Once this R-1 district was posited, less restrictive residential districts were conceived allowing in descending order for duplex housing (R-2), multiple dwellings and small apartment houses (R-3) and, finally, large scale apartment blocks (R-4). Observe now that it is appropriate to refer to this as a descending order of exclusiveness because, traditionally, zoning districts have been cumulative. That is, while only single-family homes are permitted in an R-1 district, an R-2 district allows for single-family homes and duplexes, while an R-4 district allows for all the uses specified in R-1 through R-3 and large scale apartment developments. Zoning therefore allowed for increasingly heterogeneous land use as the districts descended from the pinnacle of the single-family home district.

Of course, along with residential districts, commercial and industrial districts were created. Once more there were apt to be several subclasses of each of these districts, envisaging again a descending and accumulating scale of larger and less polite installations. Peculiarly enough, what with the cumulative principle still at work, it was perfectly permissible to build a single-family home in the lowest and last of the

industrial districts, an area that typically allowed for sewage disposal plants, garbage and refuse incinerators, scrap iron, junk, scrap paper and rag stowage, cemetaries, crematores, jails, and any manufacturing or industrial operation not allowed elsewhere. In point of practical fact, the very lowest industrial district tended to be regarded as a dumping ground into which all the land that could not otherwise be classified satisfactorily was put. It must be understood, however, that the early proponents of zoning did not see any conflict between the cumulative principle and this dumping ground technique which at face value envisaged housing in the worst conceivable environment[2]. Hidden here, perhaps, was the assumption that, if the district lines were drawn correctly, market-forces would ultimately cause each district to be exploited to attain its maximum potential and so perforce each residential, commercial and industrial district would evolve into a homogeneous and nuisance-free area. All in good time, or so it was thought, the apparent paradoxes inherent in the system would wither away[3].

Ominous, however, was a U-7 district in Euclid. "There is a seventh class of uses which is prohibited altogether."[4] Exiled to the hinterlands, presumably, were brick yards, gun powder factories and rendering plants: in other words, the very worst nuisance-style activities which, howsoever irksome, were necessary. The difficulty is that the farm country outside the reach of urbanization was being treated as the ultimate dumping ground for activities beyond the pale of co-existence in well ordered society.

2. Height and Area Districts.

This inventory of use-districts did not exhaust the story by any means. First of all, a system of area districts was devised whereby minimum lot sizes were mandated, and the maximum utilization of lots was fixed. Thus while in two areas an R-1 use might be the only appropriate use, in one area a house could only be built on a one-acre parcel and then the house and garage could only occupy 15 percent of the lot area, while in another area a house could be built on a quarter-acre parcel and 50 percent of the lot area could be improved with a house and garage. Second, a system of height districts was devised, setting the maximum number of stories to which buildings could be constructed in various parts of the community. While there were differences between these various districts, it was axiomatic that within each district the regulations had to be uniform for each class of building.

3. The Zoning Map as Key to Translating the Ordinance.

The reader should now appreciate Mr. Justice Sutherland's dictum in the Euclid case when, after verbally describing the ordinance that precipitated that litigation, he observed, "The plan is a complicated one and can be better understood by an inspection of the map...."[5] This observation was particularly perceptive because zoning ordinances typically are made up of two crucial parts. The ordinance itself defines concepts, such as what is a "single family," and articulates formulae by which permissible horizontal and vertical area utilizations can be calculated. In order, however, to grasp the plan for the community as a whole, to grasp the "big picture" as it were, it is usually essential to look at the map annexed to the ordinance whereon the various districts are illustrated. Indeed, as a practical matter, to the extent that zoning is planning, the plan as an operative whole is only rendered articulate on the map upon which these sundry concepts have been imposed.

C. OPERATING THE ZONING SYSTEM.

1. Creation of an Administrator.

Obviously it is not enough that the local legislature promulgates a zoning ordinance. A system, in order to function, must have staff to operate it. So it is with zoning. In order to have a viable scheme, no one should build in violation of it. This truism indicates the obvious conclusion that the local building commissioner should assume the role of "Zoning Enforcement Officer." For safety reasons there already existed an official with whom plans to build had to be cleared in order to test their compliance with the building code. It would be a simple matter, therefore, for him to look at the zoning map in order to assay that the proposals before him complied as well with the zoning scheme.

2. Creation of an Agency Empowered Occasionally to Grant Variances.

In articulating a zoning scheme, it was obvious that the district lines drawn on a map would make sense only as a whole. The very notion of a district, after all, entails viewing the community in fairly broad terms and not concentrating on a lot-by-lot analysis. Of necessity, therefore, a few parcels in any given district might not be suitable for development according to the criteria set for the district as a whole. To deny the right to develop in a different way, when economics dictated that compliant development was impracticable, would amount to confiscation of these odd lots and, perforce, as to them the zoning law would be an unconstitutional imposition of the police power. Rather than leave these lots unregulated, it was deemed appropriate to channel these problems into the system under the aegis of an agency which, upon application, could grant dispensations from the local district rules. Thus was born an administrative agency, variously known as a Board of Adjustment, Zoning Commission or Board of Zoning Appeals, empowered to grant "variances" which entitled particular property owners to develop their parcels in ways varying from the strict letter set down for their own local district. By and large this body, not untypically appointed by the mayor and serving without compensation, had the power to maintain the districts intact by only grudgingly granting variances or to render the district farcical by granting variances wholesale. Lest the exception become the rule and, via the variance, the local board rezone the community at their whim, the courts interposed themselves and developed an extremely complicated process of judicial review, all of which was designed to make certain that these boards responded to the exceptional case and did not in fact seize the chance to exploit their authority to redraft the zoning scheme to their own tastes[6].

3. Allowing for Legislative Leeway to Update the System.

It was obvious, of course, that things change so that uses which were incompatible today might become compatible tomorrow. Again, while certain land might not today be suitable for high-rise construction, a technological innovation tomorrow might make it ideally suitable for such development. A zoning ordinance, calculating as it does the most practical development of a community, is at best an educated guess as to how development will proceed. Yet changes of opinion about what is the appropriate way for a community to develop illustrate remarkable turnabouts. Apartment

houses, for example, denigrated as "near nuisances" in Euclid[7], are now espoused by some as eminently suitable fixtures in residential neighborhoods[8]. Change is a rule of life and, obviously, provision had to be made to amend the zoning scheme. Thus was born the idea that, like any ordinance, the zoning pattern could be amended by the local legislature which had promulgated it. Even so, this axiomatic truth has not been without its problems, given the American experience that local legislatures can behave in highly partisan and highhanded fashion. Thus, as with variances, there has developed a huge series of judicial review cases, the overall thrust of which has been to insure that amendments are undertaken on "neutral planning principles" as opposed to "parochial political favoritism."[9]

D. THE ZONING SYSTEM SEGREGATED FROM THE PLANNING FUNCTION

1. Separate Enabling Legislation.

It is essential to realize that zoning evolved straightjacketed within its own enabling legislation quite distinct from the broader planning function. This bifurcation of zoning and planning in separate functions was confirmed when, along with the Standard State Zoning Enabling Act, the U.S. Department of Commerce published separately a Standard City Planning Enabling Act. This segregation has continued to this day, witness the fact that new enabling legislation governing both zoning and planning enacted in Pennsylvania as recently as 1968 continued to isolate zoning as a distinct system of controls administered separately by a zoning officer and a zoning hearing board[10].

2. The Planning Commission and Subdivision Controls.

The planning function evolved out of the fact that, authorized by appropriate enabling legislation, a municipality could impose controls upon persons seeking to subdivide and develop land. In fact, these controls predated zoning. A developer typically has to satisfy the local planning commission that the internal streets in the subdivision will be in safe alignment with existing thoroughfares and that the drainage within the subdivision will be adequate. These restraints, like zoning, are police-power-rooted mechanisms designed to protect the public health and safety. But planning commissions can go further and require a developer to build the streets internal to his subdivision and then dedicate them. He can also be required to dedicate land on the periphery of his project to expedite widening already existing public streets in the future, and he can be required to dedicate portions of his land for school and park purposes. Premised as they were on the notion that subdividing land was a privilege rather than a right, these exactions were seen to exceed traditional police power authority and to rest in part at least on both the eminent domain power and the power to levy special taxes and assessments. Premised as it was then on a different rationale, there was ample reason to see planning as a discipline quite distinct from the narrower zoning regimen[11].

3. The Planning Commission and Master Planning.

The planning commission does more than oversee developers. It also is charged with the task of developing a master plan for the community. In part, a master plan is a projection of when and where new public utilities ought to be built. This kind of decision will have a profound impact on

future community development, witness how quickly the installation of water and sewer lines can convert agricultural land into terrain ripe for residential development. In part, it is a similar set of projections about future street plans and land-use plans[12]. But the master plan is more than a collection of these various projections. The whole point of the exercise is to order these parts around a central core of statements idealizing what kind of community overall is being envisaged and planned. The master plan is really a device designed to cause the promulgation of a "statement of objectives of the municipality concerning its future development."[13] Once the master plan is adopted by the local legislature it does not have the force of "law" that a zoning ordinance has. Rather, the idea is that local governmental decisions should now take place oriented around the praxis or program encapsulated in the plan. These decisions should tend not to conflict with the ultimate goals envisaged in the plan, and they should tend toward its implementation.

4. Traditional Zoning Not in Accord with the Master Plan.

At first blush it would seem self-evident that in preparing a zoning ordinance the master plan should provide the basis for the entire scheme. Zoning enabling legislation ordains that zoning should reflect a "comprehensive plan"[14]. Presumably, therefore, the answer to the simple question whether the zoning scheme reflects the need to achieve the goals set by the master plan would afford a neat test whether the scheme did illustrate a comprehensive plan. This is precisely what has not been done. Instead most courts have examined the zoning scheme standing alone and have been satisfied that a comprehensive plan existed so long as the scheme, evaluated in a vacuum, was a reasonable prescription for orderly development and not a wholly arbitrary exercise[15].

History illuminates why it was that zoning schemes were not evaluated in terms of a master plan. Until recently most communities simply did not have a master plan and, outside large cities, the notion of having a plan only became respectable when the federal government began to condition many of its grants and aids upon proof of on-going planning activity. To have equated zoning's need for an ordinance promulgated according to a comprehensive plan with the existence of a master plan would require the court to "invalidate zoning ordinances in toto, for many communities set about instituting zoning ordinances before a master plan had been prepared or even contemplated."[16] Again, of course, this existential situation tended to confirm the wisdom of treating zoning as a self-contained activity.

5. Zoning Subject to the Master Plan in the Future.

The law governing this subject is on the verge of dramatic change. Dissatisfaction with what is seen to be a deteriorating environment has generated dissatisfaction with what is seen to be a fragmented and ineffective planning system. Inevitably, along with the felt need for more and better planning, zoning will be brought into harness with planning generally[17]. Recent developments in California reveal the direction in which the law is moving. First, local governments will have to develop general plans serving as guidance systems around which to make decisions with regard to the control of land-use and the provision for new highways and

public utilities[18]. Second, zoning ordinances, whether new ones or substantial revisions of old ones, will have to illustrate conformance with the community's general development plan[19].

References cited in Part II

1. Euclid v. Ambler Realty Co., 272 U.S. 365, 390-395 (1926); Fraser v. Parker Funeral Homes, 201 S.C. 88, 96-97, 21 S.E. 2d 577, 581 (1942) ("No higher use could be made of a piece of property than to have established thereon this greatest of all institutions, the home.") The Supreme Court has recently ratified this theme, sustaining a local ordinance which defined a single family so as to exclude more than two unrelated persons occupying a home. In so doing, Mr. Justice Douglas waxed eloquent about "zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people." Village of Belle Terre v. Boraas, ___U.S.___, 39 L. Ed. 2d 797, 804 (1974).

2. Bassett, "Zoning," 9 NAT. NUM. REV. 315, 325 (1920):

   " [T] he surroundings are unhealthful and residences in such locations are almost sure to become neglected and unsanitary [yet] the residences do not hurt the neighboring factories, and the grounds of prohibition cannot be based on the [nuisance law] maxim that one should so use his own land as not to injure another."

3. BASSETT, ZONING 105 (1936):

   "Zoning has sought to safeguard the future, in the expectation that time will repair the mistakes of the past."

4. Euclid v. Ambler Realty Co., 272 U.S. 365, 383 (1926).

5. Id. at 383.

6. E.g., Otto v. Steinhilber, 282 N.Y. 71, 75-76, 24 N.E. 2d 851, 852-853 (1939):

   "Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

7. Apartments in R-1 areas characterized as "mere parasite [s], constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-395 (1926).

8. "Whether it is generally desirable that garden apartments be freely mingled among private residences under all circumstances, may be arguable. In view, however, of Tarrytown's changing scene and the other substantial reasons for the board's decision, we cannot say that its action was arbitrary or illegal." Rodgers v. Village of Tarrytown, 302 N.Y. 115, 126, 96 N.E. 2d 731, 736 (1951). See also Appeal of Girsh, 437 Pa. 237, 263 A. 2d 395 (1970), where the Supreme Court of Pennsylvania held unconstitutional a zoning ordinance that failed to provide for apartment dwellings except by variance.

9. See, e.g., Udell v. Haas, 21 N.Y. 2d 463, 235 N.E. 2d 680 (1968).

10. See generally Krasnowiecki, Zoning Litigation and the New Pennsylvania Procedures, 120 U. PA. L. Rev. 1029, 1032 (1972): " [N] othing has been done to abolish the distinctions that exist between various regulatory activities on the local level, such as zoning and subdivision control. The cumbersome and divisive distribution of powers and functions..established by the Standard Acts of the 1920's, is continued as before."

11. See generally Johnston, Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 CORNELL L. Q. 871 (1967); Reps, Control of Land Subdivision by Municipal Planning Boards, 40 CORNELL L. Q. 258 (1955).

12. CAL. GOV. CODE § 65302 (Supp. 1974):

"The general plan shall consist of a statement of the development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals. The plan shall include the following elements:

(a) A land-use element which designates the proposed general distribution and extent of the uses of land for housing, business, industry, open space, including...public buildings and grounds....

(b) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other local public utilities and facilities, all correlated with the land-use element of the plan.

(c) A housing element....

(d) A conservation element....

(e) An open-space element....

(f) A seismic safety element....

(g) A noise element....

(h) A scenic highway element...."

13. VT. STAT. ANN., tit. 24 §4382 (a) (1) (Supp. 1974).

14. Standard State Zoning Enabling Act §3 (U.S. Dep't of Commerce, rev. ed. 1926) ("Such regulations shall be made in accordance with a comprehensive plan....")

15. See particularly Udell v. Haas, 21 N.Y. 2d 463, 471-72, 235 N.E. 2d 897, 902 (1968):

"No New York case has defined the term 'comprehensive plan.' Nor have our courts equated the term with any particular document... As the trial court noted, generally New York cases 'have analyzed the ordinance*** in terms of consistency and rationality....'"

16. POOLEY, PLANNING AND ZONING IN THE UNITED STATES 18 (1961).

17. See Reps, Requiem For Zoning, available from Center for Urban Development Research, Cornell University, Ithaca, N.Y.

18. CAL. GOV. CODE §65100 (Supp. 1974):

"By ordinance the legislative body of each county and city shall establish a planning agency."

CAL. GOV. CODE §65300 (Supp. 1974):

"Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city...."

19. CAL. GOV. CODE §65860 (Supp. 1974):

(a) County or city zoning ordinances shall be consistent with the general plan of the county or city by...January 1, 1974....

Compare Ariz. Rev. Stat. Ann. §9-462.01E (Supp. 1974):

All zoning ordinances or regulations adopted under this article shall be consistent with the adopted general plan and specific plans of the municipality, if any, as adopted under Article 6.

See also Nev. Rev. Stat. §278.250 (Sess. Laws 1973).

III. THE PARAMETERS OF ZONING

> "Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and cannot be used by those officials as an instrument by which they may shirk their responsibilities."
>
> -National Land & Investment Co., v. Easttown Township, 419 Pa. 504, 215 A.2d 597 (1965)

A. ZONING AND THE GENERAL WELFARE.

1. The Scope of the Authority to Zone.

Throughout the Nineteenth Century it seemed clear that a state legislature could exercise its police power authority to achieve objectives capable of being encapsulated within the rubric of health or safety or morals or general welfare. A railroad, for example, owned a bridge over a stream, but subject to the public right in the waterway. The state legislature conceived of an irrigation project to increase the supply of tillable land. This project would involve broadening the stream channel, which in turn would require the railroad to replace its bridge with a new longer one. The railroad attacked the legitimacy of the project precisely because it did not involve health, safety or morals. According then to the railroad, the general welfare standing by itself would not justify the exercise of the police power. The first Mr. Justice Harlan demolished this thesis:

> "We cannot assent to the view expressed by counsel. We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.... The foundations upon which the power rests are in every case the same."[1]

This sweeping canon, however, did not last.

While the details need not detain us, it remains a fact that between 1917 and 1934 the Supreme Court took a very narrow view of legislative authority to tinker with an economy the judges thought best controlled by its own immutable laws[2]. The net result was that state legislatures were restricted to matters of immediate concern to the public health, safety, and morals while their authority over the general welfare suffered an eclipse. [illegible]id was a product of this era, hence the extended analysis in terms of [illegible]h and safety, and even the doubt over the result of the case until it wa[illegible]nounced. Ultimately, of course, a confrontation between the executive and the judicial branches of the federal government led to a recasting of the law.

The New Deal controversy did cause the Court to confirm again that state legislatures could concern themselves with the economic well being of

the community. General welfare tended to make its reappearance on the jurisprudential stage in the garb of economics. When New Orleans, for example, imposed architectural controls on the Vieux Carre, regulations that did not better the public health and safety, and certainly were not directed at improving the public morals, the litany ran like this:

> "The preservation of the Vieux Carre...is a benefit to the inhabitants of New Orleans generally, not only for...sentimental value...but for its commercial value as well, because it attracts tourists and conventions to the city...."[3]

This "tourist trap" rationale has subsequently been repeated elsewhere[4].

This precise issue was not settled again in Pennsylvania, for example, until 1958[5]. The question arose when the owner of a large home insisted upon her right to convert it into a rooming house, notwithstanding the fact that the district was zoned for single-family residences only. The petitioner argued that police power restraints could not be imposed upon her property to inhibit her decision-making capacity, because a rooming house did not entail a threat to the public health, safety or morals. The court disposed of this argument by citing the thesis laid down much earlier by the elder Harlan in the Chicago railway case[6]. Omen for the future, Justice Bell dissented and warned that licnesing state legislatures to regulate properly under the guise of bettering the general welfare was tantamount to recognizing an "unlimited police power."[7]

Crucial to Pennsylvania's decision that the general welfare caption justified the exercise of the police power over real property was the Supreme Court's own decision several years earlier in Berman v. Parker[8]. In this case the owner of a sound building located in a blighted area of Washington, D.C. contested the authority of a local public agency to condemn the building as part of an urban renewal scheme. The controversy came to be phrased in terms of the police power, condemnation being treated merely as a tool, selected in lieu of a regulatory approach, to attack the problem of urban blight.

> "The power of Congress over the District of Columbia includes all the legislative power which a state may exercise over its affairs...We deal, in other words, with what traditionally has been known as the police power...."[9]

This being the case, the usual grounds of health, safety, and morals would seem to have justified the exercise of government authority. Indeed, given the palpable existence of health and safety ends to be achieved, the only issue would seem to have been whether in order to expedite the reconstruction of a blighted neighborhood it was reasonable to include for seizure even the occasional sound buildings within the project area. Mr. Justice Douglas, however, chose the occasion to concoct an expansive thesis.

> "Public safety, public health, morality, peace and quiet--these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it...Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may indeed make living an almost insufferable burden....

> ...The concept of the public welfare is broad and inclusive....The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled....If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."[10]

This then describes the full sweep of the police power.

Since Berman v. Parker it has been axiomatic that

> "conscientious municipal officials have been sufficiently empowered to adopt reasonable zoning measures designed towards preserving the wholesome and attractive characteristics of their communities and the value of taxpayers' properties."[11]

Thus communities can, to preserve their overall character, fix reasonable minimum lot areas[12], minimum floor areas for residential dwellings[13], and segregate trailer parks into special zones[14].

2. Exclusionary Zoning.

Increasingly criticism has been heard that some suburban communities have exploited their authority to zone to exclude newcomers from their precincts. Some communities have in fact opted to preserve their "character" to the extent of requiring four- and five-acre minimum lot zoning in single family residence districts and excluding entirely apartment house developments. Pennsylvania's highest court has been the most active in striking down overly restrictive zoning ordinances "whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities."[15] In actuality, however, Berman v. Parker licensed the broad view of zoning to achieve, not suburban exclusivity, but "well balanced" communities[16]. Thus, as ever, while growth can be channeled, it cannot be aborted by zoning.

> "...nor shall private property be taken for public use, without just compensation."

B. THE FIFTH AMENDMENT.

1. Introduction.

The legislature can enact measures to protect the general welfare, and at first thought the scope of this authority would seem to be circumscribed only by the capacity of the lawyers to concoct a general welfare justification for any particular enactment. A state legislature might not unreasonably conclude that media violence contributed to the increase in crime and so set up a system of censorship. The end would clearly involve the general welfare and the means would be reasonably adapted to achieve the end. Even so, the enactment would be void because the due process standard in the Fourteenth Amendment, which applies to the several states, includes

the basic civil liberties enumerated in the Bill of Rights, among them being the guarantees of free speech and press.

Precisely this kind of situation occurred on the zoning scene in 1974. The zoning ordinance of a tiny village restricted occupants of single-family homes to traditional families or not more than two unrelated persons. Six students from a nearby university rented a house within the village and, when the authorities objected, they tried to concoct a constitutional argument to overturn the ordinance, asserting that it abridged their "rights" of association, travel, and privacy. The Supreme Court refused in this context to find that the students had any fundamental rights that were being abridged. In fact, Mr. Justice Douglas again waxed eloquent over the objectives a local legislature might seek to attain under the umbrella of general welfare:

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within Berman v. Parker...The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people."[17]

Given the appropriate general welfare objective, moreover, the means adopted were reasonable. A line had to be drawn somewhere defining family, after all, and any line leaves out someone who might have otherwise been included. "That exercise of discretion...is a legislative, not a judicial function."[18]

The Fifth Amendment, however, provides that governments cannot take private property for a public use without the payment of just compensation. It is precisely this constitutional check upon the scope of legislative authority justified in terms of the general welfare that must concern us.

2. Pennsylvania Coal Company v. Mahon[19].

Life would be simple if a state legislature possessed two distinct powers, namely, the authority to regulate the use of land to protect the general welfare and the authority to condemn land upon the payment of market value. In simpler times, it did appear that these two powers were quite distinct. Thus, the Kansas legislature once adopted prohibition in the name of the general welfare and to this end outlawed even the manufacture of intoxicants. The difficulty was that this left a manufacturer with a worthless brewery on his lands, a result he characterized as a "taking" of property without the payment of just compensation.

Again it was the first Mr. Justice Harlan who reasoned that this argument had no merit. First, the government had not actually taken possession of the plant. Second, it being nigh unto a public nuisance anyway, there were no vested property rights involved in the brewery. Thus:

> "The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use...."[20]

All well and good: a public nuisance had no rights. This was illustrated again when in the Hadacheck case the court sustained the Los Angeles ordinance prohibiting the manufacture of bricks within the city limits, a regulation that overnight reduced the value of a parcel of land from $800,000 to $60,000[21]. A zoning ordinance often enough reduces the value of land, as where a lot is restricted to residential use when it would be much more valuable if it could be used as a commercial site. But what if, given a non-public nuisance situation, land-use controls were to totally destroy the value of a parcel?

The law of Pennsylvania at one time was peculiar in that it divided a fee simple into three "estates": surface rights, mineral rights, and support. What this meant was that a coal company which owned the last two estates could mine without regard to the harm subsidence would cause the surface owner. Concerned over the safety of the surface dweller, that state's legislature exercised its police power to forbid mining under dwellings. Here then was a regulation which, like the Kansas one, rendered certain property, in this case mineral rights, worthless. But in this case Mr. Justice Holmes condemned the enactment.

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[22]

Pushed too far then, regulations imposed upon land use become void because they are tantamount to uncompensated takings of real estate.

3. The Taking Calculus.

Diminution in the value of land caused by the imposition of regulations is not the litmus signalling that an unconstitutional taking is occurring. "There is no set formula to determine where regulation ends and taking begins."[23] The test is said to be one of reasonableness[24]. Be that as it may, as a rule of thumb a regulation becomes confiscatory when the owner of land cannot realize a reasonable return on his parcel as zoned.

Averne Bay Construction Company v. Thatcher[25] is a classic illustration of a regulatory scheme that ran afoul the taking rule. A section of Brooklyn, not yet developed, was zoned exclusively for single-family residences long before urban overspill made residential development likely. In practical effect, this area became a land bank ready for future use and was protected meanwhile from commercial developments which, when the time came, would spoil its residential potential. Plaintiff owned a parcel of land in the district and found that there was no profitable use to which he could put his parcel in the immediate future. While no one is entitled to the highest possible return on his parcel, plaintiff sued to have this ordinance declared void. The court agreed.

> "An ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property."[26]

Thus objectives properly encompassed within notions of general welfare may not always be accomplished by zoning.

Early efforts to create flood zones generated considerable litigation along this line. The New Jersey decision in Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills[27], has become a classic. A township amended its zoning scheme to create a meadowlands zone in order to preserve its swamplands as water-holding areas. The only uses permitted as of right in the new zone were greenhouses, agriculture, wildlife sanctuaries, and the like. Other uses consistent with keeping intact the zone were allowed by special permit. When he was not allowed a permit to fill his parcel in order to put it to intensive commercial development, a landowner went to court and prevailed.

> "While the issue of regulation as against taking is always a matter of degree, there can be no question but the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water detention basin or open space. These are laudable public purposes...[b]ut such factors cannot cure basic unconstitutionality."[28]

Paradoxically, plaintiff was entitled to his profit even though his use might inflict harm on others. Mr. Justice Holmes, however, would have said that the danger of flood damage to the public was no excuse to shift the damages over onto this property owner. Reform could, after all, be achieved by taking the land for a public use and paying for it[29].

Whereas Morris involved an upstream lot, Dooley v. Town Plan & Zoning Commission[30] involved a shore parcel which its owner wanted to subdivide for housing. The Fairfield zoning ordinance allowed only for uses such as marinas, truck and nursery gardens, and playgrounds. In light of potential floods, there was a purpose behind the scheme, but it was held void as confiscatory because it diminished the owner's property value by 70 percent. The same result obtained when Maine attempted with its Wetlands Act to prohibit a landowner from filling and subdividing his tract of undeveloped coastal marshland[31].

The net result of all this has been to teach that certain restraints imposed upon land, howsoever laudable, will fail as regulations. The clear-cut alternative strategy is to achieve the same public purpose by condemnation. The lack of available monies, however, often renders the alternative academic. Thus there have evolved intermediate strategies. Government may acquire partial interests in land, such as easements, to achieve the purpose at hand at reduced expense. Taxes may be manipulated to create incentives for an owner who puts his parcel to the desired use. Thus land-use controls have become a continuum of controls running a gamut from pure takings to pure regulations, with many a variant between the poles.

4. Environment as Catalyst of a New Calculus?

It is interesting to note that the New Jersey court recently suggested that the Morris County Land[32] case might have to be re-examined.

> "The approach to the taking problem, and the result, may be different where vital ecological and environmental considerations of recent cognizance have brought about rather drastic land use restrictions in furtherance of a policy designed to protect important public interests...."[33]

This is a prophecy well worth a moment's notice.

It has been suggested that there is a key to the taking cases which runs as follows. The police power can be exerted, like nuisance law, to stop A from exploiting his land when it entails harming his neighbor, B. Thus, in a residential area, A can be restricted to a residential use. A's lot could not, however, be zoned for use exclusively for park purposes. In this situation, the public would be trying to make A confer a benefit upon the public at his private expense. Thus, in Morris County Land, the public were trying to get water catchment areas for their benefit at A's expense, a "taking" according to this thesis. What, however, if harm to the public was postulated when waterways were polluted? Would not the analysis now indicate that A could be prevented from filling swamp land if such an action caused ecological harm to the public?

The Wisconsin decision in Just v. Marinette County[34] is extremely significant in this regard. A county ordinance divided shorelands into general purpose, general recreation, and conservancy districts. The conservancy districts were postulated upon those parcels designated as swamps or marshes on United States Geological Survey maps. Uses permitted as of right in these conservancy districts were limited to the harvesting of wild crops, forestry, and fishing. Any use that would involve filling or dredging required special permission. Notwithstanding this scheme, the owner of a parcel within a conservancy district commenced a fill operation, a violation that precipitated both a fine and an injunction. Inevitably, on appeal, the property owner sought to have the ordinance categorized as a taking.

The court took the position that a taking only occurred when government through restricting land use sought to obtain a public benefit. Quite properly, however, the police power could be used to prevent a landowner from causing harm to the public. The public in this case, however, had rights in the unpolluted waters of the state. Thus,

> "In the instant case we have a restriction on the use of a citizen's property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizen's property."[35]

But this was only part of the story.

While standing by itself the dimunition in value of the land caused by the imposition of regulations is not controlling, the enormity of this figure always looms large in the taking calculus. Traditionally this figure is calculated in terms of what the land would be worth if it could be developed minus its value subjected to the regulations. This has really meant measuring the owner's potential gain which he might realize if let alone by the authorities. The Wisconsin court, however, did not allow the Justs to use this potential. Instead

> "While loss of value is to be considered in determining whether a restriction is a constructive taking, value based on changing the character of the land at the expense of harm to the public rights is not an essential factor or controlling."[36]

Rather, the "true" or "unregulated value" of the parcel should be calculated in terms of its value in its natural state. Removing the owner's speculative gain from the calculus removes a factor which, while not controlling, often enough compelled the conclusion that an ordinance was confiscatory.

Even more significant in the long run, perhaps, was the thinking involved in removing speculative gain from the equation. Land, like any other commodity, has been valued in terms of cash value, and this value includes its potential development value. The taking cases have tended to protect these speculative values as part and parcel of the very notion of property rights. In Just the Wisconsin court called into question this traditional conception of property.

> "Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes?...An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses."[37]

Accepted at face value, Just has removed the taking constraint when the general welfare basis of the exercise of the police power pertains to subject-matter susceptible to categorization in terms of the public right in a decent environment. The case potentially is so revolutionary that one is forced to wait upon developments before assaying its true parameters.

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2. See Adams v. Tanner, 244 U.S. 590 (1917); Nebbia v. New York, 291 U.S. 502 (1934).

3. New Orleans v. Pergament, 198 La. 851, 858, 5 So. 2d 129, 131 (1941).

4. Sante Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); Opinion of the Justices to the Senate, 333 MASS. 773, 128 N.E 2d 557 (1955).

5. Best v. Zoning Board of Adjustment, 393 Pa. 106, 141 A.2d 606 (1958).

6. See note 1 supra.

7. 393 Pa. at 120, 141 A 2d at 614 (emphasis in original).

8. 348 U.S. 26 (1954).

9. Id. at 31-32.

10. Id. at 32-33.

11. Pierro v. Baxendale, 20 N.J. 17, 30, 118 A 2d 401, 408 (1955).

12. Bilbar Construction Co. v. Easttown Township, 393 Pa. 62, 141 A 2d 851 (1958). But see National Land & Investment Co. v. Easttown Township Board of Adjustment, 419 Pa. 504, 215 A. 2d 597 (1965).

13. Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A. 2d 693 (1952).

14. People v. Clute, 18 N.Y. 2d 999, 224 N.E. 2d 734 (1966).

15. National Land & Investment Co. v. Easttown Township Board of Adjustment, 419 Pa. 504, 215 A 2d 597 (1965).

16. See quote supra at n. 10.

17. Village of Belle Terre v. Boraas, ___U.S. ___, 6 ERC 1417, 1419 (1974).

18. Ibid.

19. 260 U.S. 393 (1922).

20. Mugler v. Kansas, 123 U.S. 623, 668-669 (1887).

21. See p. 11 supra.

22. Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 415 (1922).

23. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

24. City of St. Paul v. Chicago, St. P., M. & O. Ry., 413 F.2d 762 (8th Cir. 1969), cert. den. 396 U.S. 985.

25. 278 N.Y. 222, 15 N.E. 2d 587 (1938).

26. Id. at 232, 15 N.E. 2d at 592.

27. 40 N.J. 539, 193 A. 2d 232 (1963).

28. Id. at 555, 193 A. 2d at 241.

29. Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 415-16 (1922).

30. 151 Conn. 304, 197 A.2d 770 (1964).

31. State v. Johnson, 265 A.2d 711 (me. 1970).

32. See note 27 supra.

33. AME Associates v. Township of Springfield, ___N.J.___, 319 A.2d 705, 711 N. 4 (1974).

34. 56 Wis.2d 7, 201 N.W.2d 761 (1972).

35. Id. at 16, 201 N.W.2d at 767.

36. Id. at 23, 201 N.W.2d at 771.

37. Id. at 17, 201 N.W.2d at 768.

IV. THE DEVELOPMENT OF ALTERNATIVE METHODS OF LAND USE CONTROL

"The rule is, jam tomorrow and jam yesterday--but never jam today."

-Through the Looking Glass

A. EARLY AGRICULTURAL ZONING.

Zoning tends to be an urban phenomenon, adopted as it is by local governments only when a multitude of conflicting uses requires the imposition of some sort of control over land use. Meanwhile, however, the slowly expanding tide of urbanization causes developers to move farther outside already built-up areas to create new housing estates. When developers jump ahead of the urban tide and move into "rural" areas, they seek to acquire the flattest and, perhaps, best farm land preparatory to converting it into housing estates. The necessity to provide the public services--schools, police, fire--needed by the newcomers attracted by this housing in turn causes real estate taxes to rise, which in turn causes even more farmers to sell out to developers.

Rural communities can, of course, enact their own zoning regimes premised upon the priority of the exclusively agricultural district instead of the urban-oriented single-family residence district. Commercial and industrial uses can be excluded from these districts, although nothing directly forbids someone buying a farm and using it for a home. California, however, has recognized the utility in agricultural districts of minimum lot area zoning of five acres[1] and, more recently, eighteen acres[2]. No one can obtain a permit to build a new home in this last district until he has acquired an eighteen-acre estate, a device that effectively excludes most residential newcomers and keeps land in farm use. At the same time, a residential subdivider interested in even a five-acre-lot style housing estate is stymied. Given the agricultural character of the area and the perceived need to preserve agricultural land, this exercise of the police power can be justified in rural areas when the same large lot technique would be characterized as exclusionary zoning in the suburbs proper[3].

It is said that the farmers in California's Santa Clara County were among the first to perceive the need for agricultural zoning, threatened as they were by the overspill from San Francisco[4]. This early "greenbelt zoning" not only required that the land be designated for agriculture on the county master plan, but required the owners' consent before the local legislature could zone it agricultural[5]. In addition, an adjoining city could not annex these lands without the consent of two-thirds of the owners affected thereby[6]. Thus any tax assessment of these lands should have to be calculated in terms exclusively of their value in purely agricultural terms and not their potential value as housing lots. Yet the owners who did not consent could develop subdivisions, causing the tax rate itself to rise throughout the county to pay for increased services.

While the program seems to have worked at first, second thoughts about it were caused when the developers upped their offers to buy from $3,000 an acre to $8,000 or $10,000. There appears to have developed then

a process whereby enough consents could be obtained and portions of the greenbelt annexed to a city, and thence rezoned for residential subdivision[7]. This should not come as a surprise, because traditional zoning has not locked land use into a mold forever permanent. Zoning channels development in such a fashion as to reduce conflict; it does not halt development. In Euclid[8], for example, the original zoning ordinance preserved the main avenue as a residential thoroughfare and channelled industrial development along a railway corridor farther north. Today the site of the Euclid controversy is occupied by an automobile body works, and the village has become a thoroughly urbanized segment of the Cleveland metropolitan scene.

B. REAL ESTATE TAX PREFERMENT OF OPEN LAND.

1. Introduction.

Real estate taxes have been perceived to be a key factor in the land-use equation. Land is assessed at value, and taxes begin to creep upward as farmland acquires added value, reflecting its potential for residential development. This increase in costs may accelerate the decision to convert land from agricultural use to some more lucrative one. Efforts have been made to continue to assess farm land at its agricultural value without regard to its increasing potential for something else in order to keep rural land on the urban fringe open and undeveloped.

In order thus to encourage the continued farming of land on the outskirts of suburbia, the Maryland legislature enacted a Farm Assessment Act which granted these farms a partial exemption. Three landowners who were not given an exemption, because they were not actively farming their lands, raised the question of the constitutionality of this device, citing the Maryland Declaration of Rights proviso that "all taxes...shall be uniform as to land within the taxing district, and uniform within the class." Plaintiffs won[9]. The conservationists then had to move into the political arena and sponsor a constitutional amendment to legitimize the device[10].

Postulating a constitutional scene in which it is possible to treat with agricultural land separately, a simple tax abatement for farms actually subsidizes developers to make advance acquisitions of land. They need simply keep the land in agricultural use until the time is ripe to develop it and all the time they pay less taxes than had they banked in advance nonfarm land. Obviously then, any tax advantage has to be keyed into some additional system of controls if the advantage is actually going to achieve the purpose of maintaining prime land in agricultural use.

2. Covenants.

Reacting to the Maryland experience, William H. Whyte suggested that three additional factors had to be worked into any tax preferment mechanism:

> "First, the open space assessment would apply not only to farmland, but to any land the openness of which would benefit the public....Second, open-space assessment was to be geared to the land-use plan of the local government....The third provision was for a partial recapture of taxes when open space was converted to another use."[11]

This is precisely what Pennsylvania had set out to do in 1966[12].

The Pennsylvania system applied to farmland, at first to fifty-acre units but later to twenty-acre ones, and to forest land, water supply land, and open space land generally[13]. These lands were eligible, moreover, only if they were appropriately designated on a municipal land-use plan[14]. This being the case, the owner could enter into a covenant with the county government, a covenant being a species of contract that binds subsequent owners of the real estate as well as the immediate promisor. This covenant runs for ten years and is automatically extended year by year unless appropriate notice to terminate it is given by one of the parties. Each year, in effect, the landowner and the county entered into a new ten-year contract. On its part, the county promises to assess the subject land at its market value for the use to which it is restricted by the covenant. In turn, the land owner commits himself not to alter the style of his use during the running of the covenant. In the event the landowner does alter the use, he is liable to the county for the difference in taxes between the amount actually paid and what would have been due without the restrictive covenant. While these damages are calculated from the time the agreement commenced, in no event is the landowner liable for more than five years of back taxes[15].

California, as has been seen, made provision for exclusively agricultural zoning. Zoning, however, while it does channel development, does not stop it. California assessors, therefore, continued to assess farmland in terms of its development potential on the assumption that zoning controls were, in a real world, a paper tiger[16]. This led to the Land Conservation Act of 1965, or the Williamson Act[17]. This system provided for a ten-year contract along the same lines as the covenant system adopted in Pennsylvania when prime agricultural land was involved. By way of a further inducement, the county could pay the farmer an annual five cents for each dollar of assessed land put under contract. Provision was made for cancelling the contract before its term had expired, but this required state-level approval. At the same time, however, a landowner and county could enter into an "agreement" for a shorter period when the land, including prime agricultural land, fell within a zone designated by the county plan to be an "agricultural preserve."

Given the more flexible agreement route, relatively little prime agricultural land was subjected to the long-term contract constraints. The owners of farmland opted for short-term agreements in order to preserve their freedom of choice, and the county governments were not anxious to lose the tax revenues involved in the contract approach[18]. The California voters, however, approved an amendment to the state constitution mandating that assessors should assess "such open space lands on the basis only of such restriction...and...shall consider no [other] factors."[19] A number of modifications were then made in the system, but the printed reports about the mechanism have not been favorable.

> "The Act does not preserve open spaces near urban centers... It does not provide relief for the farmer in the path of inefficient sprawl, since it does not give him a realistic incentive in the face of high capital gains from land sale."[20]

At best, perhaps, the mechanism has preserved open land beyond the immediate pressure of urbanization - no mean feat in itself - while it has neither protected much prime agricultural land on the urban fringe nor proved to be a solution to urban sprawl[21].

C. EASEMENTS.

It has been suggested that tax-reduction devices "should be regarded as half-way measures, justified only when political processes will not accept permanent restrictions."[22] In castigating overly large lot zoning in suburbia for its exclusionary effect, Pennsylvania's highest court has suggested that:

> "If the preservation of open spaces is the...objective, there are means by which this can be accomplished which include authorization for...condemnation of development rights with compensation paid for that which is taken."[23]

All of which renders relevant the scenic easement device.

The Wisconsin decision in Kamrowski v. State[24] illuminates this scene in a thrice. In order to protect the natural scenery along certain highways, the state condemned a "scenic easement" over private lands abutting them. In effect, this easement imposed a status quo on the use of land as it then was, effectively taking away the owners' rights to develop differently in futuro. Given compensation, these controls were immune to the argument that as regulations they amounted to confiscation. The only question was whether there was involved a public purpose that would justify the use of the taking power. It was held to be a public purpose.

Given the contemporary perception that food is in short supply and perforce farmland a national resource, the state could condemn a similar easement over farmland. Irrevocably removed from the local scene would be the choice to put this land to a different use, in which case tax assessments should have to be imposed exlusively in terms of the subject lands' value as agricultural land. In short, there are no constitutional objections to this praxis. The choice is a political one[25].

D. STATE LEVEL CONTROLS.

Zoning tends to be a diffuse system of controls Balkanized into hundreds of locally based systems. Tax preferment schemes affect the local tax base immediately at a time when local governments are hard pressed to make up any reduction in real estate revenue by increasing taxes on nonfarm land. Any large-scale development right acquisition program may exceed the financial capacity of local governments. Thus, parallel with these approaches to land-use control, there has developed a trend toward exercising more authority at state level.

Concern over the loss of land used for growing pineapple and sugar cane crops caused Hawaii[26] to resort to a system in which a state-level commission places all land into urban, rural, agricultural, or conservation districts. Urban districts roughly approximate already developed areas, whereas rural districts are equivalent to mainland suburban ones. Urban

districts are subject to municipal zoning controls, but rural and agricultural districts are subject to control directly by the state commission. In urban areas land is taxed at a higher rate than buildings in order to encourage its development. At the same time the system provides for a lower rate of real estate taxation in agricultural districts. In large measure, however, the Hawaii system was designed to control the transition of the state's economy from one based on agriculture to one based on tourism. So parochial are the problems of Hawaii that it may not be a helpful model for mainland use.

Vermont also found itself invaded by recreational and second-home developers. Close beneath that state's greenery is bed-rock promising disaster when developers clustered houses on tiny lots served only by septic tanks. Scattered development all over the landscape, moreover, promised future capital budgeting nightmares if later more civilized forms of sewage disposal had to be provided. On paper Vermont already had enacted modern enabling legislation which required that, before a community enacted zoning and subdivision controls, it had first to do comprehensive planning[27]. Like most enabling legislation, this was permissive only and many municipalities simply had not acted. Action once the threat was perceived would take time. The strategy then centered upon a state-level approach to land-use control, particularly at a time when concern over Vermont's environment made a state-wide approach politically feasible.

A state-level environmental board was charged with the duty to create a development plan to project how best the state should evolve. Once goals are perceived, the board is to adopt a land use plan broadly demarcating the proper use of land in the state, whether for forestry, recreation, agriculture, or urban purposes. The municipalities in turn are expected to gear up their planning within the context of this overall state plan. Meanwhile, however, certain large-scale developers have been subjected to the need to obtain state permits to proceed.

Henceforth the developer of a housing project containing ten or more units would have to obtain a permit from a district commission. So would the developer for commercial or industrial purposes who was dealing with (1) more than one acre of land in a community that had not implemented its planning authority, or with (2) more than ten acres of land anywhere. Eligibility for a permit was premised upon a number of complex criteria. A subdivider remote from public services, for example, would have to demonstrate that the potential public costs of his proposal would not outweigh its tax and other public benefits. The developer working in a rural area would have to demonstrate compatability of his proposal with the state's development plan, projected local public services, and the potential of the area's road system[28].

If and when local communities implement their control potential, these developers will have to obtain clearance at both state and local levels. Critics point out that this will add to the cost of housing. They further point out that the district commissions can impose conditions upon subdividers. Underground wiring, generous open space, and hypertechnical grading requirements do preserve the environment, but they also increase substantially the unit costs of housing[29]. A member of the Vermont legislature which enacted the original form of this regulatory scheme in 1970 has protested that it has led in practice to the centralization of the

control of land use at the state level, and that it presages a return to the feudal notion that land is merely "held" for the benefit of society[30].

E. NEW THRUSTS.

Along with the conventional mechanism thus far rehearsed, entirely new techniques are coming into prominence. In lieu of property taxes, for example, taxes imposed upon the profits obtained from land sales may have an even more direct impact upon the pattern of land-use decision-making. Thus Vermont has begun to impose a tax upon capital gains derived from real estate transactions, designed to "bite" precisely upon rapid transfers of land. Positing that speculation in land entails quick turnovers, this system is designed to encourage precisely the opposite behavior[31].

At the same time, "development rights" may yet evolve as a market in their own right designed to circumvent the "taking" conundrum. Posit, for example, the owner of two adjoining lots, one empty and the adjoining one occupied by an historic landmark. A police-power designation prohibits the destruction of the landmark building, but this "regulation" may be void as a "taking" if a reasonable return cannot be had from the building. In an urban center real estate taxes are likely assessed upon this historic site in terms of its "best" use, exacerbating the scene because these taxes, fixed in high-rise terms, tend to prove the unreasonableness of any return on the designated building locus. Let the owner of the historic site "transfer" his zoning law potential to build over and above the landmark to his adjoining lot, however, and a new calculus obtains. His real estate taxes on his "landmark" decrease because any potential to build bigger no longer exists, while he has exploited this very potential over his empty lot by building extra dimensions. He has lost nothing, so nothing can have been taken[32]. Transpose this notion into an exchange between rural land and urban land, and a similar strategy may yet circumvent the taking charge[33].

F. PROJECTIONS DANGEROUS.

Sufficient unto the day, local zoning likely will be replaced by more sophisticated land-use controls, leading to a multi-faceted mechanism blending police-power regulations, condemnation, and the taxing power. Overall definitions of "policy"--decisions over preserving farmland and at what costs--will likely migrate to state level. Administration of controls will likely shift to at least a regional focus. Beyond this, prediction is futile, because in this Republic the precise dimensions of this new system will be tailored to meet the felt needs of each individual state.

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4. WHYTE, THE LAST LANDSCAPE 48 (1968).

5. Note, Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning, 12 STAN. L. REV. 638, 640-42 (1960).

6. CAL. GOV. CODE §35009 (Supp. 1974).

7. WHYTE, op.cit. n.4 supra, 49-50.

8. See PART I, supra.

9. State Tax Commission v. Wakefield, 222 Md. 543, 161 A.2d 676 (1960).

10. See WHYTE, op.cit. n.4 supra, 105-106.

11. Id. at 111. Interestingly enough, Whyte was not able to obtain his last two refinements in Connecticut where he was most active designing a system. Id. at 112-113; CONN. GEN. STAT. ANN., tit. 12, §§12-107a et seq. (Supp. 1974). Maryland itself subsequently adopted a limited roll-back provision.

12. Session Laws of Pennsylvania, Public Law 1292, Jan., 13, 1966.

13. PUR. PA. STAT. ANN., tit. 16, §11941 (Supp. 1974).

14. Id. at §11942.

15. Id. at §11946.

16. NADER STUDY GROUP REPORT ON LAND USE IN CALIFORNIA, POLITICS IN LAND 35-36 (1973); Note, Property Taxation of Agricultural and Open Space Land, 8 HARV. J. LEGIS. 158 (1970).

17. CAL. GOV. CODE §51200 et seq. as amended (Supp. 1974).

18. NADER STUDY GROUP, op.cit. at n.16 supra, 38.

19. CAL. CONST. art. XXVIII.

20. NADER STUDY GROUP, op.cit. at n.16 supra 41; ROCKEFELLER TASK FORCE, THE USE OF LAND 129-130 (1973):

> "The Williamson Act and its administration have been much criticized....The situation is worse in New Jersey...In one New Jersey county a major beneficiary of property tax benefits is a public utility that is seeking an industrial buyer for the acreage it now maintains in agriculture."

21. Note, Property Taxation of Agricultural and Open Space Land, 8 HARV. J. LEGIS. 158, 189-192 (1970).

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25. See particularly Rosso v. Puerto Rico, P.R.R. (1967), appeal dismissed per curiam, 393 U.S. 14 (1968). This is hardly a new idea, witness NATIONAL RESOURCES PLANNING BD., PUBLIC LAND ACQUISITION IN A NATIONAL LAND-USE PROGRAM pt. II (1940).

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27. VT. STAT. ANN., tit. 24, §4401 (Supp. 1974).

28. See VT. STAT. ANN., tit. 10, ch. 151 (Supp. 1974).

29. BABCOCK & BOSSELMAN, EXCLUSIONARY ZONING 165-68 (1973).

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INFLUENCING LAND USE THROUGH PUBLIC ADMINISTRATIVE ACTIVITIES

Ronald W. Pedersen

"Influencing Land Use through Public Administrative Activities" is a subject that can bring to mind a dictatorial bureaucrat or an army of citizens with eager attorneys determined to do battle with the administrator of some program or development. Or one may picture citizens seeking in other ways to influence the real or imagined administrative discretion thought to be in the hands of a government official. If you are in government, with the responsibility to make public decisions, it may cause reconsideration of the impact of your actions, as you strive to work in the public interest and somehow account for all aspects that must be allowed for within the framework of some law or policy.

Professor Roberts has introduced some of the legal and operational aspects of direct and indirect police power, and subsequent speakers will cover development rights and easements, incentives, and tax policies. I will try to confine my comments to the grey zones between these; zones characterized by administrative decisions relative to public policies.

I will make a few background observations and then briefly discuss:

- types of decisions that may be of concern, with some notes on the forces at work and their impact;
- several thoughts on the ways in which the citizen, teacher, extension agent, and bureaucrat can influence policies and administrative decisions affecting land use, and finally;
- some constraints on developing policies and influencing decisions.

Background Observations

1. There seems to be a view held by some that administrative actions can be neatly separated from legal and legislative aspects of land-use policy. Such a distinction is arbitrary at best, and I think a brief example will dispel any ideas about its "neatness."

In New York, we have had a state aid program for years to help towns upgrade rural roads - farm-to-market roads, we used to call them. The historical record makes it clear that persons in administrative positions originally proposed the program and later proposed its expansion. It

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required legislative action, however, to pass the proposed program and an administrative decision to sign it into law. Annually, administrative and legislative action provides the needed funds. State-level administrative decisions allocate available moneys among eligible towns. Town deliberations, which may be both legislative and administrative, lead to applications for funds and to decisions on which roads shall be improved. At several points in the process, administrative decisions have been guided by rules that are legislative, yet that were administratively proposed.

2. How far can administrative decisions really shape policies? What are their impacts?

Administrative decisions - and therefore their impacts - usually take place within a complex web of private and governmental decisions, making it difficult to locate the "key" link or act. I'd like to discuss "points of intervention" in greater detail a bit later, but at this point it may suffice to say that the key decisions influencing land use are often difficult to identify with certainty.

Overall, the "system" we are considering may resemble a volleyball game of public and private administrative and legislative actions, one then another coming from various parts of the court over the years. Decisions at one point on the court are always to some degree in response to past actions elsewhere on the same court.

3. Some of the administrative decisions that come to mind when considering land use are virtually global in scope and impact. Others may have an impact on only one small area, or at most one small area at a time.

When the Federal Reserve Bank changes the interest rate, the impact is profound, with direct and indirect effects on every industry, family, land developer, farm operator, and level of government. The same can be said for changing a few key words in the federal income tax regulations, or a new ICC freight rate ruling.

Such broad-scale changes are often, in theory, very attractive. Characteristically, they are associated with maintaining a "favorable climate" and suggest that our profit-oriented demand and supply system is basically sound but needs a bit of adjustment to keep it working for and not contrary to the goals at hand. The alternative is, in many cases, to follow a negative approach - "fighting the system."

I prefer the approach in which government is not put in the position of being expected to know the best answer at each specific step. On the other hand, the results of the "favorable climate" approach are uncertain - one can never be sure of them because of the many factors involved. Also such indirect, more slowly impacting approaches may not satisfy popular demands to address a particular situation quickly.

At the other end of the spectrum there are any number of narrow policy determinations and administrative decisions, authorized because of some special concern, often single-purpose and regulatory in nature. After April 1975, in New York, a permit will be required by anyone planning to excavate more than 1000 tons of sand, gravel, or any other minerals. Responsibility for approval rests with the Department of Environmental

Conservation which, upon application, must require that:

a. operations will be consistent with environmental protection goals;

b. there is a viable reclamation plan to restore land to other productive use;

c. reclamation is assured by performance bond.

The approvals are clearly administrative within a given legislative framework.

There is a tremendous range of "administrative decisions", from those that set national fiscal policy within certain limitations to ones that govern restoration of mined areas according to legislated guidelines, grant zoning variances, or interpret provisions in a building code.

4. Administrative decisions may have impacts far beyond those expected or even contemplated by the framers of the original law. For example, administrative approval for a new or expanded municipal water supply in New York requires a number of findings, including the public necessity for the new supply. This element of necessity has not been considered nearly as diligently as a literal reading might allow. Suppose it were? It would be difficult to list the aspects of the community's public and private past, present, and future that would not then be subject to administrative analysis.

In addition to public necessity, a proposal for a new or expanded municipal water supply must assure consideration of other possible water sources, sanitary control of the watershed, and adequacy of supply. It also must not affect other municipalities adversely.

These provisions of law, on the books since 1905, were aimed at protecting upstate communities from the encroachment of New York City's water supply reservoirs but could have been used to substantially influence the nature and extent of the growth of many communities throughout the State and thus could have considerably influenced land use in many communities. The responsible administrators during the early years of the law, however, did not have the broad-based support needed, or did not try to use the program to shape land use. While we are now reading the law through different eyes than may have been done in the past, it is without doubt still more law than we can administer to its full potential.

Quite a different example of a potential for far-reaching administrative action under what appears at first glance to be a narrow law is found in the Clean Air Act Amendments of 1970. Complex air pollution sources are now subject to review. Complex sources, as contrasted with the simplicity of a smokestack or exhaust pipe, would be a planned new highway with a capacity of 1500 vehicles per hour, or parking lots that can handle 1500 cars. A permit for such facilities is required with the main condition for approval being reasonable assurance that air quality standards will not be exceeded. This creates the possibility for administrative control of land use on a large scale in some instances. Occasionally

legislators use circuitous routes themselves in creating mechanisms for land-use control. The 1973 amendments to the Federal Flood Insurance Act will do far more over the long term than just prevent loss of life and property from flooding, or provide insurance when damages do occur. This act, through the power of the federal government to control banks and thus the terms under which mortgage money may be made available to home and land owners, will force state and local governments to pass laws and ordinances that will keep many of our best agricultural lands growing corn instead of houses or mobile homes. In this case no administrative extensions are needed to accomplish land-use controls.

5. Of course the consequences of many laws and decisions often are not very fully anticipated though clearly very great. Highways laws and the administrative processes they create provide examples.

When Route 17 in New York was modernized from a winding two-lane route from New York City to the Catskills a few years ago, it was only a short time before the curve of increasing land values in many rural communities jumped off the chart. Vast areas of beautifully rugged topography suddenly were an hour or more closer to the New York City metropolitan area. It has been described by some as a dam breaking, with an on-rush never really anticipated.

You can cite other examples where a new highway was the major factor for a wide change in rural land use. Such major routes were conceived, designed, and constructed largely with a view to the economic development of the cities they connected, but their impact on rural areas actually was very important.

Massive new highways to forge modern links between urban areas are no longer on New York's agenda, nor on the agenda of most other states, but probably more because money is short than because rural land-use effects have been carefully evaluated.

Current legislative and administrative policy is to improve and maintain the present highway system, and it's probably reasonable to assume that, given the system already installed, this broad policy will continue. Thus, the impact of new highways on rural land use - in a broad regional sense - may now be reasonably static, with few changes in the future as sweeping as those in the recent past.

6. There is another entirely different sphere of "administration" affecting land use that is worthy of brief mention. It is the area of public professional guidance to private decision-making and is an especially important activity of land grant colleges, though often participated in to some extent by state government agencies. Guides to private land-use decisions have been issued in many subject matter areas including crop varieties, rates of fertilization, animal practices, silvaculture, and marketing advice.

I suspect that some "mistakes" in guidance have been made over the years, but for the most part this activity has helped to reduce the cost of food in this country, contributed to increased timber production, and made the countryside more attractive.

Types of Decision-Making

Before moving to ways of influencing policy and some of the constraints to be faced, a brief review of some of the types or levels of decisions may be helpful.

The role of the legislature is perhaps more widely known and understood by the average citizen than that of the administrative agency. Even if he is hazy about legislative committee proceedings and investigative hearings, the business of enacting laws appears clearcut. And to a lobbying group or a concerned citizen, there is access to individual legislators. In contrast, the types of administrative decision-making are known to few.

There are two principle types of administrative decision-making, rule-making, and adjudication.

A newly enacted land-use statute may include considerable detail on standards to be applied and procedures to be followed, or it may be quite broad in scope with little detail. One of the first actions of the agency charged with administering a law is the formulation of rules and regulations, which are usually subject to public hearing before becoming final. This rulemaking procedure, which is in a sense a legislative process carried out by an administrative agency, is a critical point of input for those who wish to have an influence on administrative decision-making. Insofar as it will provide specific interpretations of the statute and establish or clarify standards to be applied, it is clearly more important than an individual adjudicatory proceeding. Indeed, it is often the rules more than the statute itself that determine how narrowly or how broadly the law is to be applied.

The adjudicatory proceeding, on the other hand, is carried out under the mandate of the statute and agency rules, and considers a request from an individual applicant (say a project sponsor) for approval to undertake some specification (say a development project). This is a quasi-judicial process in which any concerned parties-in-interest can participate in order to influence the decision.

Finally, an aggrieved individual or group may resort to a judicial proceeding to appeal the actions of an agency in rulemaking or in adjudication to the courts. The usual grounds are that the action was arbitrary and capricious, since the court will seldom consider substituting its judgment for the agency on the substantive issues.

To illustrate the administrative process let's consider the New York State Tidal Wetlands Act. The act, which took effect on September 1, 1973, is rather brief, containing a declaration of policy: "...to preserve and protect tidal wetlands and to prevent their despoilation and destruction giving due consideration to the reasonable economic and social development of the State". Other key provisions include: a definition of tidal wetlands; a charge to the Commissioner of Environmental Conservation to inventory and map the wetlands' boundaries and develop land-use regulations for their protection; a requirement for a moratorium on alteration of tidal wetlands until the land-use regulations are adopted; provision for permits and enforcement.

Looking more closely at the moratorium provisions, some key features in the statute and the rules may be of interest. The statute prohibits the alteration of any tidal wetland or immediately adjacent area. The administrative rules define what an alteration is and provide certain exclusions. The rules also set limits on the immediately adjacent area - 300 feet landward or ten feet in elevation above sea level. No seaward boundary limit is established.

While the law briefly outlines the procedure for a hearing, the rules delineate specifics on the conduct of the hearing, including the powers of the hearing officer. The statute assigns responsibilities to the Commissioner of Environmental Conservation. The rules provide for delegation of powers to a central tidal wetlands administrator, local tidal wetlands administrator, and hearing officers.

Influencing the Decision-Makers

Let's turn now to some of the ways in which administrative actions can be influenced by individual citizens and special interest groups. Here are some suggestions:

1. Know clearly what is being sought, define the objective in terms of steps that relate to the end results desired. Get your ideas to the right place or person.

Never underestimate the impact of a well-written letter. Government officials, legislators, and corporate presidents read and consider points of view logically expressed. Their motives may vary, but they do read their mail.

In 1966, former Dean Charles Palm of the New York State College of Agriculture and Life Sciences discussed with former Governor Rockefeller a relatively brief but well-documented report on the impact of urbanization on agricultural lands in New York State. From that discussion and a mutual recognition of the broad issues involved came a series of administrative actions and legislative steps of tremendous impact.

A special liaison between the Department of Agriculture and Markets and the highway builders in the Department of Transportation was established by administrative action to minimize taking of prime farm land. The legislature authorized tax deferments on new agricultural investments, the Agricultural District Program was initiated, and a permanent commission was established to prod, push, educate, instruct, and influence the public and private sectors on the importance and needs of agriculture in New York. These were very specific and direct results. Several of you here today have had an important part in this effort, and I'm sure more details will emerge on some of these programs as the Conference proceeds.

2. Prevail upon decision-makers to get the facts and consider all aspects before making the decision.

Earlier, I mentioned "points of intervention", referring generally to the level, the point in time, and the people you attempt to reach to influence a decision. In general, the earlier one intervenes in the series of

many small decisions that are usually involved, the better the chances of success.

One good point at which to "intervene" at the present time is the point at which the environmental impact statement required by the National Environmental Policy Act of 1969 is filed. For each major federal action that could significantly affect the environment, an impact statement must include:

- a detailed description of the proposed action;
- a discussion of direct and indirect effects on the environment;
- identification of unavoidable adverse environmental effects;
- an assessment of feasible alternatives;
- a description of cumulative and long-term effects on the natural resources;
- identification of any irreversible commitments of resources.

Decision-makers know that when their impact statement is filed their proposals will be subject to public scrutiny. You'd be surprised what a sobering impact that has on those charged with administering construction programs. But remember, it is the public scrutiny, not just the act of filing the impact statement, that is the significant element to the decision-makers.

Economic impact statements are needed, too, but present legislation does not require them. We tend to overlook the added cost of municipal services caused by scattered development, and the long sewer lines and school bus routes it entails. The zoning board, in considering the new industry or shopping center, doesn't worry about the added highway burden or the new interchange that may be required, because the state and federal governments pick up those tabs.

3. Recognize the practical need for making some laws quite general, with provisions made for acquiring the specific kinds of knowledge needed for accomplishing the objective and provision for extensive administrative action based on this new knowledge.

The Private Land Use and Development Plan for the Adirondacks as passed by the New York legislature, for example, sets forth density guidelines and use limitations by broad land classes, is taking into account resource capabilities for development and existing built-up areas. The plan requires recognition of the land classes and use of the applicable criteria but does not attempt to specify which acre should not have a building or which of four corners may be used for a gas station. An administrative agency, the Adirondack Park Agency, was created to make the vast number of specific decisions needed to carry out the broad policies laid down by the law and to collect the information needed for making these decisions wisely.

4. Seek public involvement. The interest, concern, and support of the public are essential in developing and implementing worthwhile land-use programs. Unfortunately, despite the many recent steps to encourage public participation, the role of the public, even those you would expect to be vitally interested, has been minimal on a number of key issues.

During hearings in 1973 in areas of the State that were heavily damaged by Agnes floods in 1972, not more than a handful of people appeared to testify on proposed floodplain management legislation. Apathy on the part of the public? Where was local government, the agricultural community, the industrial community? Let me assure you that government wants, needs, and respects public opinion. Provide it! Choose your arguments and timing, and garner your support in keeping with the circumstances.

Some Constraints

Lest I make it sound too easy to influence policies or decisions affecting land use, a few constraints should be pointed out. They can be worked around in some instances. In other cases, long years of education or radical changes in some of our basic precepts about land use may be needed. Some examples:

1. A particular project or activity may have severe physically limiting factors, thereby reducing the possible alternatives. A pumped storage plant needs a certain topographical position, a nuclear plant needs cooling water. Neither is very appropriate for an urban area even though most of the power may be used for urban purposes. Hence power plants and the associated transmission lines will continue to be rural land-use considerations in certain areas.

2. Conflicting or inconsistent public policies may thwart first-stage efforts. Most of us would not put screens on only some of our windows if we expected to open all of them; yet public policy may allow essentially the same thing to happen. In New York, for example, we attempt to locate highways to minimize the taking of prime agricultural land, yet we do nothing to assure that the land thus saved is not then sold for a shopping center.

3. Political considerations may be major limiting factors, difficult to overcome. For example, local, state, and federal levels of government often don't trust each other, resulting in confusion and overlapping. Many local government officials cry "home rule", while state officials stress the limited perspective of local officials. Officials at one level of government often try to control a program but seek to have the next higher level pay for it.

4. Many individual citizens and citizen groups have conflicting goals that are not easy to reconcile.

It comes as no news to you that many farmers view with favor, steps to save agricultural land and keep urban sprawl at bay, but at the same time do not want any options closed for future use of their land. The reconciliation of personal goals and the larger public good - where they may differ - will never come about to the satisfaction of everyone.

5. Another well-known constraint is simply the existence of opposing views held by different groups. The views of people and interest groups do affect public decision-making, but these can be so conflicting that they provide no useful guidance to a decision-maker.

6. The reluctance to change established patterns of thinking and ways of doing things can be a most significant constraint. During the last session of the State Legislature, the Real Property Tax Law was revised to allow forest owners to have their land assessed at a level which reflects its worth when devoted to producing forest products, as opposed to being assessed at the traditional "highest and best use" value. In a recent meeting to discuss the implementation of this law, it was learned that those designated to administer it were intending to use sales prices and market analyses rather than forest income potential as a base, having quickly rejected the latter because it was such a foreign approach that those doing the work felt uncomfortable with it. Actually the law cannot have the effect that was intended unless income potentials are used in arriving at forest land values since all forest land prices reflect recreational and often residential values in addition to forest value.

A Few Concluding Remarks

There have been several dramatic efforts to improve public land-use policies in New York in recent years -- the Agricultural Districting Law, the Adirondack Land Use Plan, the new Forest Tax Law, and the Floodplain Management Law are among the most important of them. Some of these are much too new to have demonstrated their value. I urge you, however, to study also the administrative processes each of these laws has set in motion.

There are major issues pending at the national level which can have widespread impact on rural land use, ranging from transportation policies to the impact of inheritance taxes on the sizes of the agricultural units that can be passed from one generation to the next. In the land-use area, neither the problems nor the proposed solutions are static. They are identified and carried forward within a hodgepodge of decision-making and policy determination. Evaluations of program and policy impacts need greater attention, with well-interpreted feedback to emerging proposals.

As a means of having our total system working for accepted objectives, broad "climate" kinds of policies may be best. A summary comment in "The Use of Land, A Citizen's Policy Guide to Urban Growth", sponsored by the Rockefeller Brothers Fund, puts it this way:

> "We have looked for the point of leverage at which public policy might improve circumstances and free private energies to contribute to, not work against, the broader public interest".

But in many cases, such an approach may be too slow for an impatient society. Our "leverage" is apt to turn out to be only oil on a squeaky wheel.

Perhaps - just perhaps - we can learn to straighten the warped frame while we are oiling the wheel; to admit that the oil alone can't do the job.

That, I think, is what this Conference is all about.

TRANSFER OF DEVELOPMENT RIGHTS: A NEW CONCEPT IN LAND-USE MANAGEMENT

B. Budd Chavooshian

How can we protect critical natural areas, preserve open space, ensure a high quality of life, and at the same time accommodate the legitimate development demands of a growing society?

Whatever course is taken, it won't be easy! The purpose of this paper is to describe a new concept of land-use controls which holds the promise of achieving this seemingly impossible objective. It is called transfer of development rights. This is an uncomplicated idea and yet very different from centuries-old traditional laws governing land ownership and development.

"Fee Simple" is Usually Complicated

American attitudes toward real property were formed during Colonial times when there seemed to be unlimited land available. As ultimately expressed in the Northwest Ordinances of 1787, the central idea was transfer of land by "fee simple," that is, ownership confers the right of the purchaser to do anything he wants with his land except what local, state, and federal governments tell him not to do. Land was and still is treated as a commodity.

In theory at least, once the early settler received title to his land, he had a free hand to farm it, build houses or stores, or simply hold it as an investment. In practice, however, there were always restrictions. Even "squatter's rights," as formalized into law, involved building a house and living on the property claimed. Later, the Homestead Act of 1862 granted land on the condition of 5 years occupancy and cultivation. As urbanization became the prevalent pattern, the "fee simple" was often severely restricted by zoning and various municipal ordinances. Today, the increased awareness of present and possible environmental problems has added other restrictions on ownership, for example, the "impact studies" required before building can take place.

The Need for Action

Land is modern man's most precious natural resource, and its wise use is imperative. A highly developed, technological society ought to possess and enjoy an environment of the highest quality. But until very recently

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land use policies, dictated by economic, political, and social (or perhaps anti-social) considerations, have insensitively and irresponsibly squandered the land. For the most part an environment has been created that is not worthy of modern man's intelligence and highly advanced technology.

Generally, it is realized that open space provides aesthetic, psychological, and social values in the form of scenic landscapes, rolling and wooded hills, farmlands, stream valleys, flood plains, protected aquifer recharge areas, marshes, meadows, and historic areas. Yet rarely have these areas been retained and protected for their treasured and essential qualities in the planning, zoning, and development of a community. This is a strange paradox, but there are some signs now that open-space preservation is being recognized and dealt with in various ways, for example, wetlands and flood plain protection laws, coastal zoning, state land-use guidelines, and open-space purchase programs.

The Problems of Zoning

In the past, conventional zoning, the basic technique of guiding the preliminary stages of development, did not have environmental protection built into it. Occasionally, the judicious application of geologic, physiographic, and hydrologic data sometimes did produce zoning classifications and densities less damaging to the natural environment than random development. But in general, little if any of the essential natural resources were preserved. The courts often found that zoning regulations drafted to preserve large areas of land were unduly restrictive, confiscatory, and therefore unconstitutional. Moreover, conventional zoning did not preserve natural environmental qualities; at its very best it could only provide for the harmonious and efficient development of all the land. Zoning considered land as a commodity programmed to be developed for some appropriate use. It did not protect lands' natural characteristics.

To overcome this shortcoming in zoning, new concepts were developed to preserve some open space, such as the "greenbelt" concept borrowed from the "garden cities" principle established by the British. The outstanding example is Radburn, in Bergen County, N.J. Other techniques, such as clustering, density zoning, performance zoning, floor-area-ratio, and planned-unit development were prompted by the housing boom of the '50s and '60s. This permitted municipalities to explore and experiment with techniques to preserve some open space rather than have entire tracts developed by a lot-by-lot process. Cluster zoning, essentially the Radburn principle, was extensively discussed but infrequently used. However, the main thrust of all these devices and mechanisms was to preserve some open space and give relief from the typical monotonous-sprawl development created by conventional zoning.

But since these devices are applied generally to small areas and are usually an option to the existing lot-by-lot subdivision process within a municipality, the best to be achieved is some minimal break in an otherwise monotonous development. Haphazard, noncontiguous, scattered open space generally is the result. This is not necessarily bad or undesirable, but it does not protect large areas of open space such as farmlands, flood plains, steep and wooded slopes, or aquifer recharge areas, necessary for a water and air supply free from serious pollution for an increasing population.

Of critical importance for the 1970's is an environmental balance that will ensure health and safety, retain open and productive land for water and air quality, and give psychological relief from the continuous sprawl of the megalopolis. The challenge is to accomplish this without creating so-called wipeout conditions for some landowners while creating windfalls for others; to adopt a land-use control policy that balances recognized legitimate development needs with valid environmental concerns in a positive, rational, and equitable manner.

Planning and Development Rights

Almost any small-town or city newspaper can provide a lengthy chronicle of battles waged over land use. In many cases, an individual property owner may wish to maximize the value of his investment, but his neighbors feel that development threatens the desirability of their property.

Besides the basic constitutional question of individual property rights and due process, development raises the "plus" of increased taxes for hard-pressed municipalities against the "minus" of possibly making the community a less desirable place to live.

The transfer of development rights (T.D.R.) is a new technique to help solve this fundamental dilemma without violating basic rights and due process as guaranteed under the Constitution. It combines planning with certain aspects of property law.

The basic process is initiated when the municipality designates an area of open space and prohibits development therein, and the residential development potential in that area is transferred to another district or districts where the municipality determines that development is feasible.

Landowners in the preserved areas, who will continue to own their land, may sell their rights to further development to other landowners or builders who wish to develop those areas in which development is agreed on.

T.D.R. helps a community plan its growth, the net effect of which is the preservation of environmentally important areas with equitable compensation by government is involved. And at the same time the housing needs of a growing population can continue to be met.

Current Usage of the T.D.R. Technique

One of the first, if not the first to suggest T.D.R. as a technique to preserve open spaces was Gerald D. Lloyd, of Robert Martin Corporation in Westchester County, New York.[1] Perhaps because it was too new an idea and too different from traditional property ownership and development laws, it was not seriously pursued or developed into a workable form.

Nearly 10 years later a technique of this type was adopted in New York City[2] whereby air rights (one form of a development right) were permitted to be transferred from districts in which strict height limitations are set (similar to open areas that are to be kept open) to districts in which new higher height limitations are permitted. Since land values in New York are extremely high, the builders' incentive to purchase air rights is very great. The city of Chicago has been considering the adoption of a similar but more

comprehensive T.D.R. approach to preserve historic buildings as proposed by Professor John J. Costonis of the University of Illinois Law School.[3] Washington, D.C. has also adopted a similar T.D.R. ordinance.

Another example is Southampton Township in Suffolk County, Long Island[4], which has adopted a zoning ordinance with an optional transfer of development rights to preserve prime agricultural lands. Farmers are given the option of developing entire tracts under conventional zoning or of clustering development potential within an area between 20 and 40 percent of the entire tract.

This resembles cluster zoning, but in certain cases farmers can transfer the development potential (rights) of their lands to another tract in a different district in which a higher density is permitted. The farmland would then be placed in a municipal land trust and held as farmland in perpetuity. The farmer could continue to farm and pay a nominal annual rent, all the while benefiting from the development taking place on the off-site tract.

The Southampton ordinance is the first to apply the concept of transferring development rights offsite, but because of its voluntary nature, it does not assure the preservation of farmland.

The tiny community of St. George, in Vermont[5], has adopted the T.D.R. technique to preserve its rural characteristics and set the basis for a rational growth and development plan.

The first state legislation to create districts within which development rights would be transferred was introduced by Senator William J. Goodman in the Maryland Senate in January, 1972.[6] Essentially the bill provides for the designation of planning districts in which development would be permitted. Landowners would receive development rights in proportion to the amount of land owned, measured as a percentage of total acreage in the district.

These development rights must be purchased by builders, since no building would be permitted unless enough rights were obtained by the builder. This in turn would guarantee a specified amount of open space. The value of the development rights would be determined by market conditions, but local officials would set the open-space requirement.

Finally, Montgomery County, Maryland has a new ordinance that provides for the transfer of development rights for certain selected purposes. Several municipalities in New Jersey, Pennsylvania, and Virginia, I understand, are currently considering the adoption of several variations of T.D.R.

New Jersey's Recognition of the New Approach

The New York City, Southampton Township, and Maryland legislations came to the author's attention in early 1972. There was emerging a greater recognition of the enormous development pressures on New Jersey and the consequent impact on the rate of land so committed.

Land values were beginning to soar. Over 1.2 million acres of the State's 4.2 million acres were already developed. It was estimated at the

time that most of the remaining usable land would be committed to development by the year 2000. The most vulnerable land in this context is agricultural land because it requires minimum site preparation and construction costs, unlike swamps, marshes, and steep slopes.

Also, agricultural lands in many cases consist of large tracts under single ownership and are very attractive to large-scale builders. Experience indicates that this is especially true in New Jersey, and therefore, the main thrust of a transfer of development rights proposal could be to preserve prime agricultural lands and woodlands, although T.D.R. is essentially a technique to preserve any open space lands.

Cook College and the Cooperative Extension Service of Rutgers University have in recent years initiated research and programs in land use and resource management, especially with a view to preserving prime agricultural lands. At the same time, the State had created a Blueprint Commission on the Future of Agriculture in New Jersey to explore ways of preserving agriculture in the State.

The objective of these groups was to develop more rational land-use control techniques and to preserve agricultural land, not merely for the production of food and its contribution to the economy, but to ensure the health and safety of citizens in the most densely populated state in the nation. Research is indicating that strategically located areas of agricultural lands and woodlands in an urban setting not only provide open space, with all its aesthetic values, but also provide a psychological uplift and an ecological balance. Furthermore, by keeping open large land areas, normal development can occur in a less sprawling pattern and reduce, to some extent, costs of services such as utilities, school costs, roads, and other transportation facilities. Moreover, and perhaps most important, our legacy to future generations should not be a completely developed state in which the only choices would be living with past mistakes or creating open space at an extremely high economic, social, and political cost. Rather, we would leave future generations the option of what to do with the preserved agricultural lands as dictated by their needs.

It was in this context of urgency and need that we initiated, nearly 3 years ago, efforts in applied research on the concept of T.D.R., the result of which is a legislative proposal currently being considered by the State.

The New Land-Use Management Concept: How It Works

A development rights is basically a creature of property law. It is one of the numerous rights included in the ownership of real estate. A mineral right (i.e., the right to mine and remove minerals from the land), an air right (i.e., the right to utilize the air space above the land's surface), or the right to travel across another person's property are examples of the various rights of land ownership. A development right is the right that permits the owner to build upon or develop his land; in an urbanizing region it is the land's greatest economic value and therefore the owner's most valuable right.

All rights of ownership of land are subject to reasonable regulation under the police power and are also subject to the governmental power of eminent domain. Rights of ownership in land may be separated from other

rights and regulated by government or sold by the owner and transferred separately.

For example, an owner of land may sell his mineral rights or air rights and still retain ownership and use of the land surface. A common example involves an owner's sale of an access easement to a public utility so that utility lines can be established and maintained on the owner's property. Similarly, an owner may sell all of his rights to develop his land, and these rights may be bought and sold by persons other than the owner who still retains the ownership to the land.

The transfer of development rights (T.D.R.) concept, as we have developed it, is essentially a system that identifies a right to develop and creates a market for such development rights. Under this proposed system, a zoning district is established for preservation of open space, in which all development other than farming or low-intensity recreation use is essentially prohibited. The residential development potential of the zoning district before its open space designation is calculated as follows: for each residential dwelling unit eliminated in such a preservation district, a substituted dwelling unit is added to a developable district of the community. In other words, the residential development potential of the preserved area is transferred to other districts in the community which can accommodate the higher densities without doing environmental damage or creating incompatible land-use patterns, or putting heavy strains upon existing infrastructure. Development right certificates equal in number to the total dwelling units eliminated in the preserved district are distributed to the landowners in the preserved district on the basis of the ratio of the value of each tract in relation to the total land value of the preserved district. To build a substituted dwelling in the developable part of town, a development right is necessary along with the appropriate zoning.

Thus, a builder who proposes to construct at a higher density based on the new capacity or density resulting from the establishment of the preserved area must also purchase development rights to equal the increased density at a price arrived at through the bargaining process of the market place. The builder has the right to develop at the lower density permitted by the previous zoning regulations, but he cannot build the higher densities unless he has development rights. Finally, the continued marketability of the development rights is insured by adequate "incentive zoning" in the developable districts. In other words, in order for this system to remain valid and functional, there must always be a market for the development rights. Otherwise there will be, in fact, no place to transfer them, and the entire system could become invalidated and inoperative. Such a situation would occur if a builder chose not to build at the new permitted higher density, thereby creating a surplus of development rights equal to the number he could have used and for which there is no longer a market. In such an event the municipality would be required to re-zone in such a manner as to once again create a market for all outstanding development rights.

Thus, by the use of the T.D.R. technique, critical natural environmental resources such as prime agricultural lands, aquifer recharge areas, floodplains, wetlands, and woodlands are preserved at no cost to local taxpayers.

A Summary of the Steps Involved in Creating a T.D.R. Zoning Ordinance

1. In the proposed municipal enabling legislation, the first step in implementing this system involves a specific identification of the area to be preserved. It must be an area(s) with residential zoning and substantially unimproved land consisting mainly of farmland, woodland, aquifer recharge areas, flood plains, steep slopes, or marshes, etc. The preserved area(s) must correspond to the community's master plan so that the area(s) essentially represents the product of a well thought out, rational planning scheme for orderly growth and development for the community.

2. Once the preserved district is designated, its residential development capacity or potential under the current zoning must be calculated by the local government, converted into development rights, and then distributed to the property owners in the preserved district. This is done on the assumption that a development rights is equal to each dwelling unit eliminated, so that the total number of development rights distributed in the preserved district must equal the total number of eliminated dwelling units for the entire preserved district. This total represents the development potential of the preserved area.

3. Each owner then receives development rights on the basis of the value of his tract in relation to the value of all the land in the preserved district. This method of distribution is employed so that the particular location and other characteristics of each tract are taken into consideration, since some may have a higher market value than others.

4. The next step is the creation of a situation that will give "value" to development rights; that is to say, create a market for them. To accomplish this, the municipality must designate other districts in which a new and higher density development will be permitted if accompanied by development rights. The total permitted increase in density in the district will depend on the number of outstanding development rights issued as a result of the designation of the preserved district.

The actual increase in residential density over and above the former zoning maximum is the incentive that should attract a willing buyer of development rights. The specific increase for any one acre can only be established in light of the facts and conditions in each municipality. In some cases medium-density, multiple-family zones may be designated. However, it may very well be that in certain instances single-family residential dwellings on small parcels will be enacted, especially in areas where it is desirable to do so from a marketing and planning perspective. In any event, the planning and zoning for the higher permitted densities must be the result of sound planning principles to avoid incompatible land-use patterns and undue strains upon the natural environment and infrastructure.

Moreover, whatever new density requirements are established in whatever location, the overall result must be a new zoning district in which it is more desirable to build with development rights primarily because it is more profitable for the builder. In short, the new densities permitted must in fact create the incentive.

5. Finally, the proposal concerns the continued marketability of development rights. The incentive to purchase development rights must be

perpetuated until all outstanding rights are utilized in actual development. Since building proposals can be approved without development rights as a prerequisite, if the proposals conform to the old zoning, it is possible to have a surplus of development rights. If this should occur so that more development rights exist than land upon which they can be utilized, it then becomes the responsibility of the designated body of government to rezone another district in which development rights can be used, that is, to re-establish the market for development rights and "incentive zoning." Again, the rezoning must be made in accordance with the master plan in order to reflect sound planning principles.

Public hearings must be held with proper notice to land owners in the preserved areas, as well as notice to all other affected parties at each critical step in the process. Appeals to the courts of all decisions will be provided for and the general tenets of procedural due process of law must be observed throughout the implementation of the program.

Taxation of Development Rights

Although a development right is personal property, it would be taxed in a manner similar to real property. For assessment purposes the initial value of a development right would equal the difference between the assessed value of the land for agricultural or lesser purposes and the assessed value of the land for development. The first sale of development rights in the open market would then be used to establish the assessed value of development rights in the future. The land in the preserved area is taxed as real property, although assessed at its farmland or lesser value. Under this approach there is no change in the payment of taxes by the various taxpayers in the governmental jurisdiction.

General Legal Implications

Any form of police-power regulation resulting in virtually total economic loss is potentially assailable as a taking of property without just compensation, in violation of the federal and state constitutions, not withstanding the benefits for society as a whole. In an urban state like New Jersey where land is extremely valuable because of its actual or speculative potential for high-density development, restriction of use to open space and agricultural pursuits would result in a sharp economic loss. The issue raised is whether the economic loss to the property owner, which admittedly is great, can be justified in light of the benefits gained for society. To date, in New Jersey the courts have very clearly stated that such a loss is a burden too great to be carried by a few landowners for the benefit of the general population. Transfer of development rights is intended to redress the landowner for his loss and therefore serve as a form of compensation.

Development rights are clearly valuable in an urban area where virtually all forms of development, whether of high, medium, or low density, are in great demand in the marketplace. However, even in this seller's market, development rights are not intended as just compensation in the legal sense, for example, as under eminent domain. They are rather a substituted form of development potential given to the property owner to reduce the severity of the impact of the police-power regulation which restricts the use of his land. However, it does not stop here. The

severity of the police-power restriction must also be reviewed against the benefit to the public.

An examination of the benefits to be gained through the retention of productive open space in an area of vigorous economic growth has taken on new meaning. Generally, the argument for the preservation of open space has been based on an aesthetic notion that we must preserve our scenic areas. Certainly this is important, although not so critical as to justify very restrictive zoning regulations. However, we are now discovering that the wise, productive, and beneficial use of open space is essential for maintaining an ecological harmony, for improving the quality of air and water, as well as the psychological well-being of the population. Open space breaks in an otherwise endless stretch of subdivisions are becoming imperative. Pollution in many areas of New Jersey is practically an accepted condition of life. We know that if the population continues to increase, all of these problems will be intensified and will endanger basic health and safety. This recognition of the health and safety aspects of open space preservation must be clearly documented and accorded considerable weight in the judicial balancing process.

Some Planning Implications

The primary objective of the transfer of development rights as proposed here is the preservation of open space. However, the impact of this technique on the planning process cannot be ignored. More predictability, essential to effective planning, is promoted, since all open space designations are identified and permanently locked into the master plan and in zoning regulations. Also, the desired number of people who will live in the community is clearly set forth through the emphasis on the density requirements necessary for guaranteeing value for development rights. And, in many instances, water supply can be more accurately predicted, since the aquifers and recharge areas will be protected in the open areas, and total population can be, to a major extent, related to the water supply. Once approximate total density is established, better judgments relating to the planning and construction of capital improvements can be accomplished because districts in which development is permissible can be very effectively planned on a comprehensive scale and related to the tracts of permanently preserved open space. In this process the locations of more intense development are identified, and public services and facilities can be geared to it.

Another important aspect of development rights is the probable interest and participation of many citizens of the community in the planning process. Many will have development rights to protect and will be much interested in the process that gives "value" to their development rights.

Continuing Research

With the funds from Title V of the Rural Development Act of 1972, a demonstration project is currently being conducted in South Brunswick Township, Middlesex County. The purpose of the project is to demonstrate, under simulated conditions, but working with Township officials and citizen groups, how a T.D.R. zoning ordinance would be drafted and the problems that would be encountered. The project is in the early stages of delinea-

tion of the preserved areas which will probably include prime agricultural lands, woodlands, aquifer recharge areas and floodplains. Criteria, standards, and methodology for delineation are being developed. The project is scheduled for completion by July 1, 1975. If it is successful we will then devote the next two years, again under simulated conditions, to testing the manner in which the marketplace responds to this new marketable "commodity".

The T.D.R. Game

As a consequence of the relative complexity of the T.D.R. concept, a gaming approach was used to investigate some of the problems and issues inherent to the process. The T.D.R. game, itself, actually went through an evolutionary process that paralleled the development of a T.D.R. legislative proposal for which the game was used as a research tool.

There is currently a tremendous amount of interest, within New Jersey and nationally, in the T.D.R. process, and the T.D.R. game is being made available to facilitate an understanding of the concept and to promote additional research on it. It is anticipated that when T.D.R. legislation is passed, the game will be used as an educational and research device in conjunction with the legislation, both in formal educational settings and with government units and citizen groups who will be involved in T.D.R. programs.

To make the T.D.R. game easily available to any person or group interested in pursuing T.D.R., for either research or education, Dr. George H. Nieswand[7] and Teuvo M. Airola[8], the authors of the game, have published a manual which should be printed shortly.

Footnotes and References

[1] Gerald D. Lloyd, Transferable Density in Connection With Density Zoning, Urban Land Institute Technical Bulletin No. 40, 1961.

[2] Section 74-79 et seq., Transfer of Development Rights from Landmark Sites, of New York City, New York Zoning Resolution, revised 5/21/70.

[3] John J. Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," Harvard Law Review, Vol. 85 (1972), 574; also John J. Costonis, "Development Rights Transfer: Exploratory Essay," Yale Law Journal, Vol. 83 (1973), 75; and John J. Costonis, Space Adrift, (University of Illinois Press, Urbana, Illinois, 1973).

[4] Section 2-40-30, "Agricultural Overlay District", of Zoning Ordinance No. 26 of 1972, of the Town of Southampton, Suffolk County, New York.

[5] Susan Andrews, St. George Slays His Second Dragon, Chittenden, 1971.

[6] S. 254, Senate of Maryland; introduced, read first time and referred to Committee on Economic Affairs, January 20, 1972.

[7] Dr. George H. Nieswand, Associate Professor, Environmental Systems, Cook College, Rutgers University.

[8] Teuvo M. Airola, research interne, Department of Environmental Resources, Cook College, Rutgers University.

PUBLIC PURCHASE OF DEVELOPMENT EASEMENTS

William L. Park

This conference was called to provide a forum at which the nature and potential effects of alternative agricultural land-use policy recommendations might be explored. Several states in the Northeast have officially sponsored committees or commissions which are carefully evaluating new tools for preserving viable agriculture in urbanizing situations. One of the foremost of these involves the creation of protected agricultural preserves or zones through a program based on privately owned and operated farms and the public purchase of development rights from such farms.

The purpose of this paper is (1) to briefly review the conditions leading to a perceived need to preserve agriculture near urban centers; (2) to examine the social benefits derived from agricultural operations; (3) to present principles or guidelines for evaluating policy proposals; (4) to describe the program for the public purchase of development easements as proposed by the Blueprint Commission on the Future of New Jersey Agriculture; and (5) to present some advantages and disadvantages of the New Jersey proposal.

At the outset it should be made clear that the development easement purchase proposal discussed below is neither intended nor expected to be anti-development in nature. It is, rather, a program for redirecting development away from prime agricultural areas, leaving marginal agricultural lands, selected open areas and woodlands for developmental purposes. It is not a question of land shortage but one of use. Even in New Jersey, with an average population density of approximately 1000 persons per square mile, about two-thirds of the state is still open.

The Impermanence Syndrome

Agricultural industries in the Garden State have long been the custodian of the State's most valuable nonrenewable land and water resources. Today, New Jersey farmers are facing problems and opportunities that are unique in relation to most of American agriculture. They operate their farms in a densely populated area between the two major population centers (New York and Philadelphia), and as a result, are subjected to intensive pressures to develop their land for housing, commerce, and industry and to phase agriculture out. And yet, being so located, they are near the largest market in the western world for the products of their farms. They

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also have the benefit of ready access to other markets, both domestic and foreign.

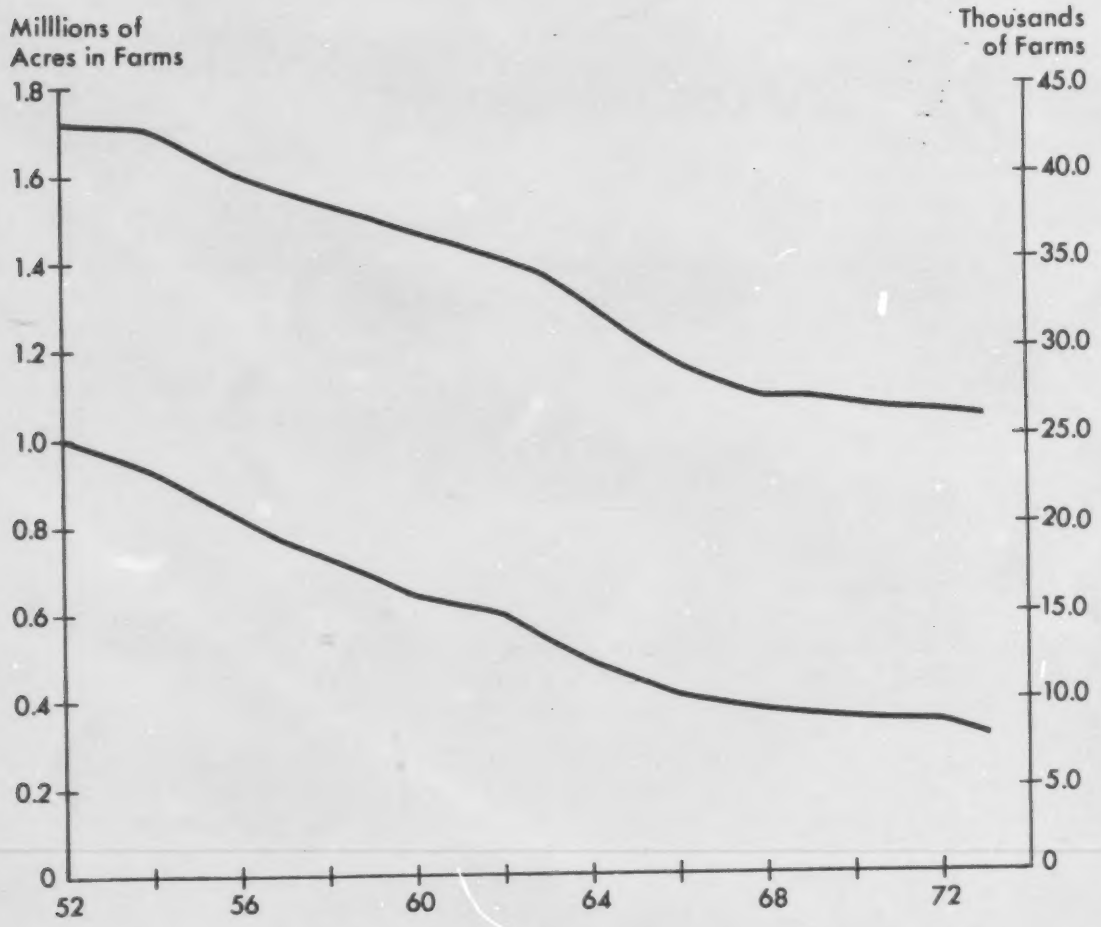
In recent years, factors largely external to agriculture, including the pressures toward urbanization, have induced an impermanence syndrome in the minds of farm families and caused radical changes in Garden State agriculture. Land devoted to farming decreased by 200,000 acres in each of the periods 1954-1959 and 1960-1964. The most severe loss occurred during the four-year period from 1964 to 1968 when over 220,000 acres were lost and converted to non-agricultural uses. This represents a 39 percent loss over a period of 20 years. This sense of impermanence and pessimism for the future of agriculture results in a disinclination of farmers to make long-term investments in plant and equipment for the fear that they may be forced out of business before such investments can be fully utilized. Nor are they likely to invest time, money, and energy to improve their marketing practices and institutions. The planning horizon is short, and in general a "wait and see" attitude prevails. (Figure 1).

The reasons for this attitude are quite obvious. First, land values have risen sharply in recent years from $528 per acre in 1960 to $1,599 in 1973[1], an increase of 8.9 percent per year. The increase in value of farmland was primarily a reflection of the demand for land for development purposes, inasmuch as the value of land for farming rose much less rapidly. As one farmer recently put it: "I plan to farm for another 15 years, plant houses, and retire." The idea of selling land at development prices was attractive to many farm families, especially if they were having trouble making a go of it at farming or were near retirement age.

Second, higher land values induced higher property taxes. The fact that property taxes were based upon the market value of the land, rather than its earning capacity, forced many to either (1) sell their farms and go out of business, or (2) sell off frontage lots to generate income to cover living expenses. This problem became very acute during the early 1960's. However, the public awareness of the problem was sufficient that in 1963 a constitutional amendment was approved which allowed local governments to assess farmland at its farm value for property tax purposes. The relief was, of course, welcomed by the farming community and by 1966-67 the egress of land from agriculture had markedly slowed. Nevertheless, tax rates are still relatively high with the result that farm taxes have amounted to an excess of $20.00 per acre each year since 1970. The national average is less than $3.00 per acre[2].

Third, the availability of alternative employment opportunities has made it easier for farmers and farm workers alike to move off the farm or operate on a part-time basis and make a living elsewhere. This reduced reliance upon the farm for family income has reduced the permanence in the use of land for agriculture. Also, farmers are frequently at a disadvantage in attracting competent labor compared to nearby industry.

Fourth, landowners are concerned that environmental protection regulations and certain measures of social legislation will make it extremely difficult to farm even if other deterrents to permanence are corrected. Such "nuisance" regulations can and have induced farmers to sell.



Source of data: New Jersey Crop Reporting Service

Figure 1. Changes in the Agricultural Land Base
New Jersey, 1952-1973

Finally, pessimism feeds upon itself. The fact that a farmer sees his neighbor sell for a good price strengthens his resolve to do the same when the opportunity to do so presents itself.

It is obvious that a viable agriculture cannot long endure under the extreme pressures outlined above. There is a need to establish a sense of permanence in the agricultural land base if farming is to long endure in the "Garden State." In 1971, Governor William Cahill directed the Secretary of Agriculture, Phillip Alampi, to appoint a Blueprint Commission on the Future of New Jersey Agriculture and charge the Commission to develop recommendations that might promote the viability and permanence of agriculture in the State[3].

Why Agriculture in an Urban State

As discussed above, land is a prime resource in agricultural production, but its use is not limited to that purpose. As urbanization takes place, it is often at the expense of the quality of the environment as perceived by urban as well as rural dwellers. There is a perceived need for open space within and between urban centers. There is a need to protect vital air and water recharge areas. There is a need to provide buffer zones around industrial sites such as electric generating plants, petroleum storage facilities, and manufacturing plants. There is a need to remove the blight of closed-in cities and generally to enhance the aesthetics and quality of living space. As the Blueprint Commission put it:

> "There is. . . a converging interest in the use of land for public purposes in New Jersey. The central issue in improving the quality of the environment is the use of land efficiently and effectively. Similarly, the central issue in improving the economic health of agriculture in the public interest involves permanence in land use."[4]

As a source of essential food and environmental open space, agriculture is an industry affected with the public interest and exists for the social benefit of the citizens of the state. It is a resource that can be used in many ways at one time. The multiple use of land increases its social value and, consequently, enhances the justification that it be preserved. According to the Blueprint Commission, the reasons for preserving agricultural open space are:

1. "to provide productive, tax-paying, privately maintained agricultural open space with its environmental benefits, including rural aesthetics and enhanced air and water quality. . . ;

2. to provide consumers with a ready access to wholesome, locally produced food products and protect the consumer buying power for food. . . ;

3. to encourage the productive use of land and natural resources which contribute significantly to the income and employment of many citizens of the state and the New Jersey economy in general. . . ;

4. to allow for the recycling of sewage wastes on land as a partial alternative to existing methods and as technical problems are resolved. . . ;

5. to establish a land reserve for future generations and prohibit premature development."[5]

Criteria for Evaluating Land Policy

Public policy and implementing legislation must possess characteristics which will assure its economic, political, and legal success. A policy recommending the recycling of social capital to promote socially acceptable goals must be framed within a practical reference. The criteria described below are intended to assist in the evaluation of alternative policy mechanisms.

In the first instance, the major factor producing farmer pessimism and lack of faith in the future of agriculture in urbanizing situations is the lack of permanence in the land base. The mechanism should therefore provide for a permanence in land-use control that is stronger than that which can be imposed by planning and zoning as presently provided. The areas designated for agricultural use must be protected from development pressure and reserved for agricultural and related open space uses only. A sufficient mass of land must also be preserved to assure sufficient volume of business for supporting supply and processing industries. The Blueprint Commission set a goal to preserve at least 1,000,000 acres of farmland including cropland, pastures, and woodlands which are contiguous to the cropland and a part of the farm.

The second factor is a legal one arising out of the first. If land is reserved for agricultural open space uses only, it is by definition denied its rights of development. Under the Fifth Amendment of the U. S. Constitution, a landowner is protected from the confiscation of property without just compensation. Therefore, the plan must provide for the compensation of landowners for the property rights of land development taken from them.

Third, an important element in the efficiency of agriculture in the United States is the private ownership and control of land. Any "taking" of property rights to assure the desired permanence in land use should be limited to the development rights to land, leaving the land resource itself in private ownership and control.

Fourth, the plan should be built around the locus of authority for planning and zoning. In New Jersey such authority is vested with the local municipality. A balance of authority between local and state agencies should be agreed upon preferably with each assuming responsibility for activities to which it is best suited.

Finally, a program which affects economic values of property will incur a cost, both direct and indirect. Such costs are frequently hidden but nevertheless real. As much as possible, the cost of the program should be equitably distributed among those who benefit therefrom. The cost of providing just compensation for rights taken from the land should be paid

out of capital gains values of land arising out of the provision of public services and infrastructure.

Elements of Present Agricultural Land-use Policy

The property tax has a profound impact upon land use in rural areas. The heavy reliance upon the local property tax in New Jersey, rather than a broad-base tax, such as the income tax, influences individual, municipal, and state decision-making. For example, the need to generate ratables as a base for providing community services is an important element in the incentive package for large-acre zoning so prevalent in rural areas.

As discussed above, New Jersey has had a use value assessment law since 1964 under which land actively engaged in farming can be assessed for local property tax purposes at its farm value even though the market value for the land is much higher. Today, there are approximately 1,001,000 acres of farmland qualified under the Act. In fact, there is relatively little farmland in the state under active cultivation that is not under the Act. This act, while it has slowed the egress of land from agricultural use since its adoption, is principally a stop-gap measure by which the State can buy time until a more permanent form of policy can be established[6]. Use-value assessment modification to the property tax law is therefore a partial solution and cannot be relied upon to save agriculture when development pressures mount.

Under the New Jersey "Green Acres Program", bond issues for 60 million dollars and 80 million dollars were approved by the electorate for the purchase of open space areas. Priority has been given to special recreation, wildlife, and historic sites amounting to nearly 230,000 acres. The program has had its beneficial effects but has not been an effective tool for the preservation of prime farmland. It too is a partial solution.

Under New Jersey law, the authority for planning and zoning under the police powers of the Constitution is for the most part in the hands of the local municipality[7]. Of the 567 municipalities in the State, 534, or 94.2 percent, have established planning boards and exert some form of planning and land-use control[8]. County planning boards and the State Division of State and Regional Planning in conjunction with local municipal planning bodies have been frustrated in preserving agricultural open space because of lack of authority and resources to meet the just compensation rule in cases of full or partial confiscation of property. In short, planning and zoning legislation as presently enacted has contributed to a more wise use of land resources but cannot be relied upon to preserve a critical mass of agricultural open space.

An innovative concept labeled "Agri-city" under a Planned Unit Development (P.U.D.) ordinance was recently proposed for a 6,500-acre tract of land in South Jersey. It was proposed that about 48 percent of the land area in the planned city be devoted to some form of open space, including about 2,500 acres of farmland. To assure the permanence of the agricultural open space, the developers were willing to deliver a covenant to the municipal fathers that the farmland would not be developed unless it is the will of the community to do so. In the event of such development, the monetary gains would not accrue to the municipality but to the original developers. Thereby a check and balance was created to the end that the municipality

could enjoy privately owned and controlled open space but it would not have an incentive to release the land to development in order to ease any future short-term fiscal problems. This kind of innovativeness is desirable and should be encouraged, but similar to other measures it cannot be relied upon to provide a critical amount of agricultural open space from the point of view of the state.

Occasionally, public-spirited persons are willing to dedicate land or development easements in land to governmental bodies. The dedication of such lands or the creation of land trusts after the pattern of the Connecticut law should be encouraged, but as before, cannot be relied upon to provide a critical mass of agricultural open space in the state interest.

Utilizing the police power provisions of the state constitution, critical coastal wetlands and river floodplain areas have been identified and excluded from the development market[9]. As expected, there is substantial opposition to the legislation by those who claim ownership to the areas involved. The question of whether such zoning constitutes a taking of property is yet to be determined by the courts. There seems to be little conflict over whether or not such lands should be preserved. The issue of contention is primarily centered on the mechanism developed to carry out the policy declaration.

Policy Recommendations

In its report, the Blueprint Commission on the Future of New Jersey Agriculture recommended that the State adopt a development easement purchase plan as a means of establishing agricultural open space preserves in the State covering at least 1,000,000 acres[10]. This represents an area nearly equal in size to that presently devoted to agricultural uses[11].

The mechanism for preserving agricultural open space as recommended by the Blueprint Commission is illustrated in Figure 1. The plan provides that: (1) local municipalities are directed to designate the prime farmland to be preserved; (2) land in the preserved areas is limited to agriculture and related open-space uses only; (3) landowners in the preserved areas may sell the development rights of their land to the State for the difference between the market value and the farm value of such land; (4) the program would be financed by a real estate transfer tax on all real estate property in the state; (5) the program would be administered by a semi-autonomous agency attached to the Department of Agriculture. (Figure 2).

Constitutional Amendment

Vreeland and Parker, in a Senate Concurrent Resolution (N.J.) recommended that the State Constitution be amended to provide for (1) a public affirmation that agriculture is affected with the public interest, (2) authorization to preserve "agricultural open space" by State acquisition of "owner's rights to develop his agricultural lands. . . ," and (3) authorization to dedicate a tax for the purpose of financing the acquisition of such rights[12]. Norman, in reviewing the proposed constitutional amendment and the need for established permanence in the preserves, confirmed an earlier recommendation by the author and others that the constitutional amendment might also include a clause that a preserve once established

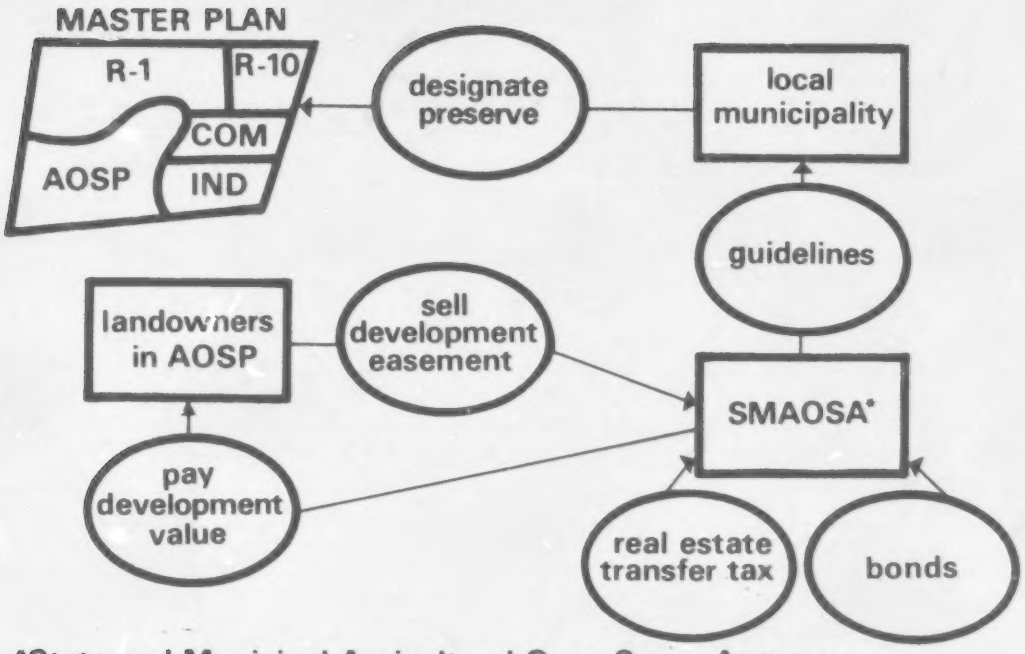


Figure 2. Flow Chart Description of Development Easement Purchase Plan

under the law could not be dissolved except by public referendum[13]. Such a procedure would put the will of the people directly behind a policy issue and thereby insulate it from short-term political expediencies. A greater sense of permanence in land use for agriculture would emerge with the constitutional and referendum backing, compared with present general planning and zoning.

Designation of Agricultural Open-Space Preserves

Under the Blueprint Commission proposal, it would be the responsibility and the opportunity of each municipality to designate the land to be included in its Agricultural Open Space Preserve (A.O.S.P.). It might consist of at least 70 percent of the prime farmland in the municipality. Although not included in the Commission proposal, two or more municipalities might be allowed to pool their resources in establishing an A.O.S.P., thereby recognizing the fact that it might be more reasonable to establish preserves in reference to physical and natural features of the landscape, rather than upon municipal boundaries.

In some instances, local officials may find it difficult to determine the location of an A.O.S.P., either because of lack of resources or through inability to resolve differences of opinion. To prevent such inabilities from delaying effective implementation of the plan, a limit of two years would be allowed for completion of the A.O.S.P. designation. After that date, the State administering agency would be empowered to make the designation.

Upon approval of the designated preserve, land included could be used only for agriculture and related open space uses. The administering agency would be empowered with rule-making authority to assure that the intent of the legislation is not subverted. It was the intent of the Commission that owner-operator farming be encouraged and that undue fragmentation of farming units not be allowed.

There is widespread concern on the part of farmers that so-called nuisance regulations will make it impossible to farm even if the permanence of the land base is assured. It is argued that farming practices, though occasionally unpleasant to nearby suburban residents, must be protected.

Purchase of Development Easements

The State administering agency, under the Commission proposal, would be empowered to purchase development easements on the land included in the preserve and thereby excluded from the development market. The designation of land to a preserve and the subsequent purchase of the development rights constitutes a condemnation of property under the principle and powers of eminent domain, as set forth in the Fifth Amendment to the U. S. Constitution. It is therefore essential that the property owner be paid fair and just market value for property taken from him.

The amount of compensation recommended by the Commission would be essentially the difference between the market value of the land and its farm value. This recognizes that farm real estate has essentially three elements of value: farm value of the land, structures and facilities value (including the farm home), and the development value of the land. Upon sale of the

development easement, the deed is modified, and future sales of the property are subject to the easement much the same as present practices regarding the sale of selected property rights such as rights of way, access rights for gas pipelines, and electric power facilities. Thus, the landowner still owns and controls the land as before, except he has given up the right to develop it for so-called higher economic uses. The private property concept is therefore preserved.

In recognition of the fact that many farm owners would not be interested in selling the development easement to their land immediately, and to allow increased flexibility, the Commission recommended that delayed sales of easements be permitted[14]. For delayed easement sales, the value of the easement would be determined at the time of the sale and would reflect the difference in the farm value, and the "would be" market value would be determined through established appraisal procedures and based upon the principle that the increase in the market value of land in the preserve would be determined to be the same as that for land similarly situated outside the preserve.

Program Cost

The funding of the program is based upon four principles: (1) the source of funds should be broadly based and paid, insofar as is practicable, by those who share in the benefits; (2) the funds should be drawn from capital gains, windfall profits, or the unearned increment on real property; (3) the funds should be collected from the same market that sets the values for development easements, thereby establishing a built-in integrity for the easement purchase fund; (4) the tax should be objectively determined and easy to collect.

The real estate transfer tax meets these criteria well. It is imposed at a time when the disutility of the tax is very small. A 4-mill transfer tax, as recommended by the Commission, would amount to $160 upon the sale of a $40,000 home. In most instances, this amount is less than the capital gains on the property generated during the previous year.

At 1973 prices a 4-mill transfer tax would yield about $26.5 million. The increase in the value of real estate in New Jersey from the preceding year was $8.6 billion[15]. The transfer tax as a percent of the increase in the value of New Jersey real estate is 0.3 percent. Our most recent analysis indicates that a 3-mill transfer tax will generate sufficient funds to purchase the development easements on 75 percent of the land now actively devoted to agriculture (750,000 acres) and will retire the debt in a period of less than 25 years[16]. Supplemental bonding authority will be needed to protect the cash flow position of the fund during the early years of the 25-year period.

Program Advantages and Disadvantages

The Blueprint Commission carefully weighed the strengths and weaknesses of several programs in relation to the criteria for evaluating land policy presented in an earlier section of this paper. Other policy approaches, such as the following, were considered and rejected because of failure to meet the agreed upon criteria:

- use value assessment of farmland for property tax purposes;
- agricultural districting (New York approach);
- transfer of development rights;
- dedication (without compensation) of development easements (land trusts);
- purchase of land in fee simple and lease back to farm operators;
- agri-city concept;
- planning and zoning;
- capital gains pooling.

The advantages to the easement purchase approach are as follows:

1. The public condemnation of development rights and the subsequent purchase of an easement modifies the deed and thereby imposes a restricted use of the land to agriculture and related open-space uses for any future purchaser. A sense of permanence in land use is established. The constitutional amendment would add a public commitment to the preservation of agricultural lands.

2. It potentially can provide a critical mass of land of sufficient size to maintain critical service industries. It was believed that 750,000 to 1,000,000 acres could not be preserved without some form of mandatory participation. It is also believed that the sense of permanence will spill over into non-preserved areas where agriculture can exist for several years.

3. It provides for just compensation for the fair market value of property rights taken from the landowner. It is based upon the concept of private property as protected in the Fifth Amendment of the Constitution.

4. It provides a balance between state and local authority wherein each can contribute to the program in a manner to which it is best suited. Home rule still has a role.

5. It protects the concept of private property as provided in the Fifth of the Bill of Rights amendments to the Constitution; and retains privately owned and operated farms.

6. It distributes the cost of the program widely to all property owners in the State.

7. A mechanism for protecting agricultural practices is provided.

The program is a departure from past policies and has <u>disadvantages</u>. The principal problems with the program are:

1. By the time the public is sufficiently concerned over the loss of agriculture to support the tax needed to save it, a large share of agricultural land may already have been subject to the bulldozer.

2. The lack of confidence in state government will bring about opposition to the proposal even though the plan itself might be acceptable.

3. Many landowners are of the opinion that their land is worth much more than it actually is. The determination of fair market value of condemned rights is a complex concept and procedure and would, as a result, be difficult for many citizens affected by the plan to understand.

4. Rigidities may be introduced into the land-use system which are in conflict with longstanding agricultural traditions of independence and non-interference.

Program Acceptability

The public reaction to the Blueprint Commission proposal has been mixed during the year following the release of the report. The leadership of the farm community as represented by the Farm Bureau Delegate Body and the annual Agricultural Convention has endorsed the programs as a means whereby agriculture might be saved. There are many rural landowners who would much prefer to be left alone, even if it means the destruction of agriculture over the next few years. Others distrust state government as an agency to determine fair market value for the development value for their land.

Others are concerned about the total cost of the program, fearing that the public will not be willing to pay the cost of a direct easement purchase program, and are seeking ways whereby the costs would be less visible and less direct. Others would prefer to avoid the "cost" altogether and create exclusive agricultural zones without regard to the "taking" and "just compensation" issues.

There is, however, a rather keen public awareness of the need to preserve farming in the "Garden State", both from the standpoint of food production and environmental open space. Two straw polls were taken in fall 1973 and spring 1974 which indicate a high degree of acceptance of the program by urban and suburban voters. For example, a poll of 3,207 visitors to the New Jersey Flower and Garden Show held at Morristown, New Jersey during March revealed that 97 percent favored an amendment to the State Constitution that would permit the establishment of agricultural open space preserves as presented in this paper; and 85 percent indicated a willingness to pay a 4-mill transfer tax to pay for it. Similar results were expressed at the Flemington Fair last fall. A recent survey by Rutgers University indicates that 79.3 percent of a statistically selected cross-section of New Jersey citizens favors preserving farms and private woodlands, and 52 percent would favor a 0.5 percent tax on real estate sales to pay for it[17].

Conclusion

Regardless of the outcome of the proposal of the Blueprint Commission on the Future of New Jersey Agriculture, there remains a need to develop concepts and policy mechanisms to meet the serious problems identified. The social cost of lost agricultural productive capacity is enormous in urbanizing areas if nothing is done. The search for solutions well deserves our attention.

Footnotes and References

[1] Farm Real Estate Market Developments and Farm Real Estate Taxes, Economic Research Service, USDA.

[2] Ibid.

[3] Report of the Blueprint Commission on the Future of New Jersey Agriculture, New Jersey Department of Agriculture, April 1973, Phillip Alampi, Secretary. The author served as an advisor to the Blueprint Commission and assisted in the development of the land policies proposed in its report.

[4] Ibid., p. 9.

[5] Ibid., pp. 9-10. See also Lee D. Schneider et al., "Issues in Agricultural Land-Use Management in New Jersey", Department of Agricultural Economics and Marketing (New Brunswick, N.J.: N.J. Agricultural Experiment Station, Rutgers University) February 1973.

[6] For a discussion of the impact of this Act upon the loss of farmland, see "An Analysis of Misplaced Hopes, Misspent Millions," a monograph by the Department of Agricultural Economics and Marketing, Rutgers University, 1974.

[7] For a full discussion of planning legislation and related matters, see Lee D. Schneider, "New Jersey Land Use Planning Techniques and Legislation," Department of Agricultural Economics and Marketing, Rutgers University, A.E. 338, July 1972.

[8] Ibid.

[9] Chapter 272, Laws of 1970, and Chapter 185, Laws of 1972, respectively, in Laws of New Jersey.

[10] Report of the Blueprint Commission on the Future of New Jersey Agriculture, p. 11.

[11] According to the New Jersey Division of Taxation, there are about 1,010,000 acres of land in the state actively devoted to agriculture as defined in the Farmland Assessment Act. This is exclusive of lands under farm homes. The total would be about 1.1 million acres. The Department of Agricultural Economics and Marketing at Rutgers University, in its annual Motor Vehicle Survey, estimates 1.1 million acres in farms.

[12] New Jersey Senate Concurrent Resolution 86, January 21, 1974.

[13] Thomas A. Norman, Attorney at Law, New Brunswick, N. J.

[14] The Commission did not limit the time that an easement sale could be delayed. It is the author's opinion that such delayed sales should not be later than 15-20 years beyond the inception of the program. As a matter of practice, the state would be granted the right of first option to buy the development rights when property is transferred.

[15] Source of data: Annual Report, New Jersey Department of Treasury.

[16] A detailed cash flow and cost analysis of the program has been conducted and will be published separately in the near future.

[17] William L. Park, John H. Hunter, and Steve George, "Public Reaction to the Land Policy Recommendations of the Blueprint Commission on the Future of New Jersey Agriculture". Department of Agricultural Economics and Marketing, S.R.-26 (New Brunswick, N.J.: Agricultural Experiment Station, Rutgers University, May 1974).

ALTERNATIVES FOR LAND-USE MANAGEMENT: TAX POLICIES AND OTHER SPECIAL INCENTIVES

Lawrence W. Libby

Land-use tools that don't fit neatly into some other category are thrown into this one. It includes a wide variety of "soft" administrative and legal devices that accomplish public objectives by encouraging certain patterns of private behavior.

Designing land-control programs, as in any other area of public policy, requires our attention to performance of available institutional options. We must compare impact with cost. Distribution of costs and benefits resulting from a particular device or set of devices is also critical--in building political support and achieving some reasonable standard of equity. We often speak, at meetings like this, of choosing among land-control devices as if our options were unlimited. In fact, though, political response to estimates of performance and impact distribution cut our options to "one or two that might sell." Standards of performance must be tied to realistic expectations for the specific technique under study. A major problem with recent land-use policy at the state and local levels has been the tendency to expect too much from a certain planning effort or set of implementing tools. There is clearly a symbiotic relationship among the elements of land policy. Desired changes in land-use behavior by owners and users of land are being accomplished with an impressive variety of promises, threats, bribes, pleas, and doses of education and research. Performance must be gauged with respect to the role each device can be expected to play in the total control package. Tax policies and other incentives can be useful only if synchronized with other land management institutions discussed on this program.

To confine this paper within manageable bounds, discussion will concentrate on tax manipulations and incentive programs designed to encourage retention of open land. Openness is an essential ingredient in use of land for farming, recreation, and timber production, among others. Open-land policy is essentially the pacemaker for development.

Tax Manipulations

Adjustments in tax burden have become a popular technique for retaining a politically favorable comparative advantage for certain open-land uses. As with other incentive programs, tax manipulations affect the economic consequences of certain land-use changes. A brief inventory may be useful:

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Use value assessment. Maryland started the use-value bandwagon in 1956, and 30 other states have followed, to a variable extent. The basic notion here is that owners of open land, as defined, will be encouraged to keep that land open if taxes are adjusted to remove the increment on value for development. Once favored tax treatment is accepted by the owner, his contribution to the public good may be further secured by various penalty devices--once led to water, he's tied to the trough, although the length of the rope and tightness of the knot are variable[1].

As suggested, performance of these use-value laws depends upon what we ask of them. Proposals in most states have started as "green acres" bills with great promise for saving open space. Their success in markedly altering the patterns of land use change is at best poorly documented. A survey of Maryland farmers found very little absolute impact on land conversion behavior in the study area[2]. A similar result was observed in Washington State[3]. But others report impact on the pace of development, if not the pattern. Use-value tax laws have apparently bought some time in areas where timing is most critical[4]. The clearest impact of all use-value laws has been to shift the local tax burden. If that shift itself is deemed socially desirable, or if it is instrumental in achieving politically supported changes in land use, special tax laws may perform satisfactorily. Those forced to pay the tax bill avoided by the favored owners may feel otherwise. If enough feel unjustly burdened, terms of the agreement and formal expectations may be adjusted. Further, analysis of who bears the added burden might even reveal inequities considered more serious than those leading to enactment of the bill in the first place.

The use-value concept has been extended to estate tax provisions of the U.S. Internal Revenue Code. All estates with a net value greater than $60,000 are subject to federal tax. Senator Mathias of Maryland proposed to the 93rd Congress that farmland, woodland, and open space in an estate be assessed at present, not potential, value[5]. To be eligible, such lands must have been in open use 5 years prior to death of the owner and must stay that way for 5 years afterwards. All states except Nevada have their own inheritance tax, subject to the same indications and limits on value as other property taxes.

Vermont has pioneered the use of the capital gains tax to discourage speculative sales (at least successful ones). Under the Vermont program, the tax rate varies directly with percentage of gain and inversely with the holding period. Maximum tax rate of 60 percent is imposed on land held less than one year and sold at greater than 3 times its purchase price[6]. Among programs attempting to lever land use with taxes, this one may be uniquely successful. Even more authoritarian controls, such as zoning, crumble under weight of potential capital gain.

Forest tax incentives. Forested land may qualify for use-value incentives discussed above. Approximately 35 states also have special yield tax provisions for commercial forest land[7]. The concept is the same: - taxes are based on income productivity in current use, not on market value influenced by the possibility of land-use change. For some reason, the lengthy legal, economic, and political debates surrounding use-value assessment of farms and open space are almost totally absent on the subject of forest yield taxes. The time dimension of timber production is a primary rationale;

annual revenue is not available to pay ad valorem taxes. Yield taxes are paid at time of timber harvest. Foresters have also pointed to the difficulty of determining market value of forest land as an argument for yield taxes. Beyond these significant administrative difficulties though, there seems to be no reason in principle to accept yield-taxation of forests and not use-value assessment of farms. In both, value must be some function of discounted future income stream, including income from other uses. Assessors face these difficult decisions all the time. But I see no a priori reason to decide that owners of forested land should be any less subject to constitutional mandates of tax equity than other categories of owners. Perhaps the weaknesses of our ad valorem system are just more obvious with forests, or perhaps forest owners are just more astute political bargainers. Few eligible forest owners apply for yield tax provisions (about 3 percent in 1972), preferring to take their chances with annual market value assessments that are hopelessly out of date. But the possibility that the forester may request the yield approach may every year influence the local government needing funds[8].

To the extent that yield taxes avoid increments of land value reflecting the possibility of second home development or other "higher value" uses, they are a tax subsidy on behalf of a use deemed to have special importance. As with other incentives, final judgment should depend on performance--its effect on the objective of keeping private land in timber production, and equity of resulting tax redistribution. That hundreds of forest owners would be forced off the land without special tax treatment is a key element of forestry litany, though evidence is scarce. Perhaps the contributions of commercial forest land to a pleasing environment are worth the cost, although the social benefit angle is seldom argued by foresters.

Another tax incentive for forested land comes via capital gains provisions. Virtually all income from timber production may be treated as capital gain, while annual costs incurred in producing that asset may be deducted from annual revenue. The declared purpose is to encourage timber production and sound silvicultural practice. The cost to the U.S. Treasury has been estimated at $130-140 million a year[9]. Some see little return for that cost;[10] others say it's the best incentive we have available for an extremely important output[11].

Most of these tax incentives are like block grants. The economic incentive is offered in hopes of achieving land-use behavior deemed broadly desirable. There is no direct earmarking of subsidies for a specific action. The obvious analytical problem is the with-without/before-after issue in any benefit cost analysis. What behavior would have occurred in the absence of the incentive? Observation of behavior change over time is not enough. Our research with tax incentives is still at the diagnostic stage.

Tax break Michigan style. Michigan's new Farmland and Open Space Preservation Act[12] may be the most innovative manipulation of taxes for public rights in open land available today. At least it's the most complex. The law essentially permits the State Office of Land Use to acquire development rights easements and agreements on open land for periods of at least 10 years, upon application by land owners acting through local government. This is the California component with a little New York thrown

in. Active farmland is handled as an "agreement"--full market value is assessed for taxes. The agreement will certainly affect value, however, since development options are constrained during the contract period. An added incentive is the fact that no special assessments for sewer, water, or lights may be levied, except as those facilities serve the farm enterprise.

Other open-space and potentially active farm land will be handled with the easement approach. Legislative approval of each easement application is required. Development rights are appraised separately and are not subject to ad valorem taxation. Lost tax revenue will be refunded to the local government. In many cases, development potential may essentially be the only value the land has. This could be a substantial tax incentive for the owner and cost for the state treasury, if the legislature should ever agree to the easement under those circumstances.

The unique aspect of the Michigan law is tax treatment of farmland under agreement. The farmer is eligible for a "credit against the State income tax liability for the amount by which property taxes on the land and structures used in the farming operation, including the homestead, restricted by such development rights agreement exceeds 7 percent of the adjusted gross household income." The same holds for beneficiaries of an estate or trust, partners in a partnership, or participants in a corporation. If the owner wants out, he must pay back the tax advantage plus 6 percent interest. If the State wants out and owner agrees, there is no penalty. If the contract just expires, the owner pays back the tax credit accumulated in the last 7 years of the agreement. The circuit-breaker approach to taxation is not new, but owners of open land constitute a new category of beneficiaries.

While the law is too short-lived to measure its performance, several observations may be made. Initiative is with the owner. He will apply if expected advantages over the life of the agreement and afterwards exceed his cost. He will stay in for the agreement period only if the cost of getting out is greater than benefits derived from sale. Given recent land prices, that may be very seldom. Of course the owner is not motivated entirely by dollars, though every virtue has its price. The hope is that the self interests of owners and non-owning general public can be accommodated simultaneously.

Commercial agriculture has become the first interest in law implementation. In years when income is low relative to the market value of the income-producing asset, the owner might pay little or no income tax. The intention here is honorable: to tie the total tax bill to annual reported income as an indicator of ability to pay. But there are a number of ways to keep annual income low, not all directly related to earning power. An eligible "person" under the act could include individual, corporation, business trust, estate, partnership, or association. There would appear to be substantial advantage in incorporating a farm operation, thus limiting eligible income to that derived from the corporation.

The program would be particularly attractive and rewarding where property values have risen in anticipation of development and annual adjusted household income can be held low. Landowners who can separate their off-farm income sources might do particularly well. Also, owners with several eligible farms might be able to juggle income among producing units or limit

participation in the program to those units with growing development potential. The ingenuity of American farmers has long been a key productive resource. To the extent these owners are maintaining land with important social benefits, the public cost of reducing the private cost of holding land may be worth it. It will do little to maintain land or help low income farmers more isolated from growth areas. It will be insufficient to hold land with high non-farm value, where the right to develop is the primary land attribute.

The overall cost of this farmland program is hard to estimate. It depends in part on how resourceful farmers are in distributing their income flows. State general revenues would suffer, and the tax burden would be redistributed. The redistributed tax burden may in fact be a reasonable allocation of cost for social benefits produced. As suggested, local property taxes will be affected to the extent that the agreement lowers value. Assessors will be influenced by the ease and frequency with which farmers void their agreements before the term expires. If the local tax shift is significant, some push for reimbursement of local governments by the State may be expected.

For all its uncertainties, the Michigan system is an impressive effort to build an incentive program with equity. The task of writing administrative rules that anticipate owner response to the law remains a significant challenge.

Other Incentives

This second major category of land use institutions involves creating whole sets of circumstances conducive to preferred land development patterns. They range all the way from direct payments to support certain activities, to research and education aimed at influencing preferences about land-use alternatives.

New York and Agricultural Districts. While details are available elsewhere[13], brief mention of the New York approach is essential to any discussion of incentive programs. Its stated purpose is to maintain economic conditions that encourage continuation of viable agriculture. Its intention is to supplement, not replace, the management judgment of the farm operator. It does alter the forces of land change in those areas where physical resources and management expectations are such that agriculture can survive. Great care is taken to assure sensitivity to State and local planning preferences, which helps build the political support needed to make the program work. In addition to use-tax provisions, farms in a designated agricultural district are immune from local restrictive ordinances deemed inconsistent with agriculture, state administrative regulations or eminent domain actions that can be avoided, and special assessments. Agriculture attains "highest and best use" status. Public actions that might endanger that status are prohibited or at least discouraged. These same public actions--zoning, extension of sewer and water facilities--are employed to pull land change pressures toward areas without great importance to agriculture.

Recent experience with the districting law is summarized later in this program. Its aim is clearly commercial agriculture, as agriculture. If farms contribute something to the living environment of New York State, so

much the better. But "open space" or "green acres" - the terms used in other land-use laws - are not stated as objectives of this program. Broad support among urban and suburban populations in New York suggests concurrence with these limited objectives, though perhaps they perceive greater non-owner benefits than anticipated by program administrators. By placing emphasis on the total economic contribution of farming to the State, the program may hasten concentration of agriculture in most productive areas and similarly hasten the exodus of "marginal" farms. It underscores the economics of comparative advantage. By shifting development potential toward these unproductive areas, the program may actually soften the dollar consequences for farmers squeezed out of production. In any event, needs of persons living and working in these marginal farm areas must be a continuing concern of rural policy in New York.

The program will not meet the long-run open-space demands of New Yorkers. Its long-run contribution to agricultural production is also open to question. As the initial eight-year contract period nears an end, farmer response will be important. But it has fostered viable agriculture, encouraged a long use change pattern more sensitive to land characteristics, and within its acknowledged limitations demonstrated a level of performance unmatched by other programs for open land.

Forestry Incentives. Sound forest management by small non-industrial firms is encouraged by funds provided under Title 10 of the 1973 agriculture law[14]. Federal funds are distributed to the states for further distribution on a 50-50 cost share basis to owners of less than 500 acres of forest land who agree to undertake certain intensification practices and reforestation. Allocation of the initial $10 million in 1974 was based on relative timber productivity in the various states, with a maximum per owner and minimum per state. The latter was based on the potential income redistribution effects of the program, as perceived by Congress[15].

Cost sharing to encourage specific activities is a familiar approach to land policy in agriculture and forestry. The last 30 years of experience includes A.C.P., R.E.A.P., Soil Bank, low interest forestry loans through F.H.A., timber development organizations set up under the Appalachian program, and others[16]. Success of any such incentive is of course dependent upon the degree of departure from current practice that is required, and the level of subsidy necessary to encourage private actions with public payoff. Targets are highly specific: acres reforested, increase in cubic feet of wood grown, acres converted from hard to softwood, reduced erosion along logging roads, miles of trails constructed. Contribution to the public interest is an assumed prelude to the political support necessary for passage of the act. Dollar costs and performance with respect to these intermediate targets are readily calculable. These are open-land uses, supposedly contributing something to the aesthetic or environmental character of the region. Performance with respect to these goals and therefore distribution of impacts cannot be as clearly demonstrated.

There are other specific incentive programs. The California Land Conservation Act and other development easement programs fit in the incentive category. Selective granting of funds for sewer and water systems, local planning, and solid waste sites have often been conditional on consideration of the various contributions of open space. Further detail is not essential for our purposes here.

Much of the effort to guide rather than control private behavior in use of open land comes in the form of research and education aimed at demonstrating certain land-human relationships. The essential purpose is to build useful behavior incentives into the values of those whose actions affect land. Human preference is the moving force in any area of policy. Various institutions are needed to gauge those preferences, and others to help form them. This conference surely has such a purpose--to help us understand the implications of land policy and perhaps impart some of that understanding to others.

Observations of Institutional Performance

Any public institution designed to alter private land-use behavior implies a certain allocation of discretion. In a very real way, this allocation also implies a distribution of the costs for achieving land objectives deemed to generate "public good." Pressure for change in land-use institutions is essentially a political struggle to achieve a reallocation of the rights to decide how land will be used. Persons forced to bear the social costs of unrestrained private ownership seek to pry some of those rights loose from ownership and thus redistribute the decision costs. Their success is some function of political power. In fact, political power has been defined as the capacity to impose costs on others[17].

Achieving land-use objectives through the controlled application of taxes and other incentives clearly retains significant discretion for the owner in fee. This approach will not work for all land qualities but seems essential for others. Strengths and weaknesses of this set of land-management alternatives may be summarized as follows:

Strengths. 1. Incentive programs accommodate rather than confront the basic economizing instinct of persons acting singly, in groups, or as some formal decision unit. Positive incentives are there, to be taken or ignored. They become part of the management judgment of the actor, not a direct contradiction of that judgment. In fact, they acknowledge the role of management in certain of the land qualities sought. If commercial agriculture, for example, provides non-owner benefits, and if business management is a critical resource in agriculture, then land-use institutions that act through the management function have a better chance of retaining commercial agriculture.

2. As a relatively marginal redistribution of ownership rights, incentive programs are likely to be less disruptive. Other things being equal, it's nice to avoid disruption.

3. Because they attempt to adjust the terms of current decision institutions rather than replace them with new ones, incentive programs are likely to entail less direct administrative cost than is true with the more authoritarian approaches. The most expensive is usually outright purchase. An elaborate police power alternative often requires establishing new decision criteria to replace market signals. Incentives simply push the market around a little.

4. Cost of achieving social objectives from private land is more clearly assessed on those who realize the benefit. Other institutions may restrict the owner on the assumption that any cost he bears is more than

offset by benefits to others. This isn't a very comforting rationale to the owner who feels he is asked to bear exorbitant costs for small increments of benefit spread broadly throughout the population. None of the incentive programs matches dollar for dollar in benefit/cost distribution, though they come closer than other techniques. The Michigan program, for example, spreads the cost throughout the income tax paying public. State citizens realize very small units of benefit from encouraging agriculture, but then they don't pay much for them either.

Weaknesses. 1. As expected, the major strengths of incentive programs are also potential weaknesses. Because they depend on self-interest, their performance beyond the specific actions of interest will be modest. They are not massive redistribution of rights in land; thus spectacular results should not be expected. Small changes often lack political appeal.

2. Incentive programs appear to be special-interest legislation. A category of tax payers or citizens is bribed (encouraged) to do things, and those who don't get bribed may feel left out. The challenge is to assure some return for that bribe, and to publicize the social benefits involved. Many state use-tax proposals have died in committee because they were perceived as one-way transfers. Of course, all land management institutions redistribute costs and benefits of decisions, and thus are special interest for somebody. Incentives for open land owners are particularly vulnerable in battles among special interests, though, since there are relatively few recipients.

3. The critical aspect of incentive programs is the link between altered circumstances and desired action. We don't really care about lowering a farmer's taxes, if it doesn't affect his land-use behavior. The intermediate product is seldom enough, unless straightforward income transfer is the only goal. Incentive programs don't pretend to force the action, and attention to program output is essential.

4. Related to the previous, the key question is "How much is enough?" The incentive must encourage action without becoming a windfall. The actual cost to the actor from failing to take the incentive must be greater than the cost of changing or continuing his land-related behavior. We must also acknowledge that it probably costs more for a change in behavior than a continuation of behavior. The successful incentive program must anticipate economic circumstances, including marginal rates of substitution among land uses for those owners whose actions are important. A major question with the new Michigan law is, who if anyone will be interested, and how will their interests affect land objectives for the state? As with all attempted bribery, the price for compliance is likely to go up over time. The life span of an incentive program is likely to be very short.

Research Needs

A number of unanswered questions have been suggested in the text and need not be repeated. As with most policy research, the major need is for careful monitoring of program output. Program costs are usually apparent, and the researcher is interested in returns at a particular cost. Incentive programs are peculiar in that neither benefits nor costs are at all clear. We must have better documentation of costs--direct costs of administration, indirect costs of foregone revenue--and impacts on land behavior. We would

like to know more precisely what circumstances encourage program participation[18]. It may be that some landowners haven't heard they are supposed to be rational, economic men and women.

Distribution of benefits and costs is the other major question, concerned not only with the usual income categories, but also categories of ownership, residence, and land output. As a general observation, incentive programs offering another management option will probably have greatest benefit for those ownerships with some measure of management flexibility already. For agriculture, it is the large commercial farms. For forests, it is the owner with something besides timber on his mind. This type of benefit distribution may be inevitable with incentive programs. As a result, income effects will not be a convincing reason to support these incentives and increase the need for documented results.

In addition to encouraging full employment of academic types, timely policy research can itself be an effective incentive for guiding land-use behavior. By recording the true impacts of private actions and implications of public choices, research will facilitate voter or consumer actions sensitive to the full consequences.

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[18] A study of the California land program concluded that enrollment is not economically rational when the landowner expects a rapid run-up in price followed by a leveling off or drop, where the time horizon of the owner is short or where his required rate of return is high. (Schwartz, Hansen, and Forn, "An Economic Analysis of the Benefits of Use Value Assessment Under the California Land Conservation Act," University of California, Davis. Prepared for American Agricultural Economics Association meeting, Edmonton, Alberta, August 1973).

THE CITIZEN, GOVERNMENT, AND RURAL LAND-USE POLICY: A STATE LEGISLATOR'S VIEW*

Gerald T. Horton

The creation of a balanced land-use and resource management policy for a given state will be the result of a political decision. And that decision will be made by politicians in the political arena of the state's legislative process.

A balanced-growth policy will not be given a state from that migratory flock of planners and consultants who leave their paper blizzard and then travel on to other contractual climes. After planners and their plans, the competing factors will remain... the developers and business interests, the farmer and the city person seeking a second home, those who prefer jobs to saving the environment, and the kamikaze conservationist who would be able to have the world as he wished if only there weren't people.

These conflicting and legitimate views cannot be rationalized in some academic process. They must be balanced, compromised, made into a policy in the political arena. Public policy - state public policy - is not the creation of a governor, or a single interest group, or a planner. It is the result of a legislative decision.

Weak as that reed may seem, it is the stake in the ground around which public debate must revolve and the staff on which we all must finally lean if a policy is to be made.

For such a policy to be adequate for the future, the public lobbies representing the environmentalists, agricultural interests, the working man, and those who enjoy neither the economic advantages of growth nor the pleasures of the undeveloped land must be strengthened. They must be institutionalized and continuing as are the lobbies of business, private interests, and the developers.

And the politician, the elected state senator and representative, must be pressed to balance these competing and often conflicting demands in the

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* This is a summary provided by Mr. Horton of his remarks at the closing session of the Conference.

framework of plans and proposals from the professionals. Your state legislatures must make the decision. To avoid the task is to leave our states in drift and indecision.

The statement of a balanced growth policy through the legislative process is a reaffirmation of the democratic system. It is an act of a civilized society that refuses to be a fatalistic victim of an uncertain future.

PART II

WORKSHOP SESSIONS

0112/0113

WORKSHOP SESSION 4

Experiences with the Use of Police Power as a Land-Use Control Technique

0114/0115

INTRODUCTION TO WORKSHOP SESSION 4
ON
EXPERIENCES WITH THE USE OF POLICE POWER AS A LAND USE CONTROL TECHNIQUE

Silas B. Weeks, Session Co-chairperson

The charge of this session is discussion of police powers as a policy tool in the control of land use. I find we tend to use the phrase "police power" rather glibly. Exactly what we mean is somewhat more difficult to define.

Perhaps we should narrow our field by noting what police power is not, at least in respect to land-use control policies or devices. Police power is not taxing power, eminent domain power, public ownership, and government spending power. This latter influences land use by where and when, for example, streets and public utilities are placed. None of the above falls within any usual definition of police power.

Police power in these United States can be defined in lay terms as the authority of any state legislature to regulate social and economic behavior up to the point that these regulations interfere with the exercise of those rights specifically guaranteed in the Bill of Rights. The more common definition repeats the litany used by lawyers; that is, government may use its powers to protect the health, safety, morals and general welfare of the community.

In connection with health and safety, police powers as related to control of land use are fairly straightforward and include such items as codes, ordinances, inspection, and licensing. Examples of these devices are building codes, occupancy permits, standards for septic disposal, permits to dredge and fill, and licenses to conduct a junk yard or a race track.

Land-use controls in connection with moral provisions, though less frequent, are at least generally established, usually by ordinance or licensing. For example, dispensing of liquor within a given distance of a church, the use of an area or building for gambling (the Massachusetts and New York Beano laws come to mind), or the more recent federal action in which the Department of the Interior refused to renew its land lease to Nevada's famous Cottontail Ranch. The madam of the ranch moved her trailers, girls, and clientele to the nearest municipality, and there as a tax-paying private property owner she has experienced no further difficulty

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- at least in regard to land use. She is, incidentally, running for the State Legislature, and Time magazine predicts she probably will be elected on the grounds that the public already believes most politicians to be prostitutes. (Ed: She was defeated.)

In regard to the welfare clause, the police power problem is more complex. First, welfare appears to be largely defined in terms of economic damage, either direct, as in the case of payment of compensation for loss suffered by the actions of an adjoining landowner, or indirect, where the loss may be potential; for example, as a result of a public-sector decision, such as a zoning regulation.

The whole area of uses involving nuisance appears to be moving from a judicial one to a legislative one. To date, most nuisance issues have fallen outside police powers except under those conditions where the nuisance involves an ordinance. The more usual situation in the past is to go to judicial review in one of three ways: to request a temporary injunction (seldom used), a permanent injunction, which is more frequent, or to seek damages. However, as pollution becomes a major policy issue, especially as to who bears the cost, the polluter or the pollutee (to coin a word), much litigation may be shifted to the legislative sector. Here we already see licensing devices, laws, and administrative regulations being formulated, particularly at the federal level, with the rise of the EPA.

The principal police power involving welfare as related to land-use controls is of course zoning, and the principal issues surrounding zoning centers is whether it constitutes a taking of economic benefit from the individual property owner without compensation. On the point, Eugene E. Reeves, University of Missouri, in a publication entitled "Pressing Land-Use Issues", March 1974, notes that it is "extremely difficult to determine where the boundary lies between permissable regulation and unconstitutional taking".

There is a great variety of court cases on zoning in almost every aspect, and in almost all cases one can find some sort of court precedent that appears to, in general, back (or negate) the position one wishes to take. However, on balance it would appear that the courts have been supportive of local governments contolling land use through zoning, so long as the control is not totally arbitrary. Two examples might be the recent New Hampshire town ordinance allowing six-acre lots, or zoning low-altitude air space next to an airport out of residential use, provided the owners of existing property received compensation.

In summary, police powers as land-use control policy are in general powers to maintain public safety, health, morals, and welfare from such excesses of individual freedom as to impose direct or indirect damage to innocent bystanders. As our society becomes more crowded and as there are more and more competing uses for the same piece of land, we may reasonably expect more conflicts of interest and hence an elaboration of policing devices. A major task of policy education should be development of skills that can aid in objective analysis of alternative policy impacts.

Let us now proceed with the business of this work session. It is my pleasure to introduce our first speaker, Dr. Frederic O. Sargent, from the University of Vermont.

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0118

VERMONT'S ACT 250--ENABLING LEGISLATION FOR ENVIRONMENTAL PLANNING

Frederic O. Sargent

Vermont's Act 250 is famous in planning circles but mostly for the wrong reasons. It is often commended as an experiment in state planning, which it is not. It is also cited as an experiment in environmental control over development, which it is. The purposes of this paper are to correct misunderstandings and to describe one of the principal results of Act 250--its role in supporting a new type of rural planning.

Act 250 consists of two parts. The first part (Sections 1-17) established a State Environmental Board, nine district environmental commissions, and a development permit system administered by the State Board and district commissions to protect the environment.

The second part of Act 250 (Sections 18-20) authorizes development of a sequence of three state plans to guide land use in the future. The three plans are: (1) an Interim Land Capability Plan, (2) a Capability and Development Plan, and (3) a Land-Use Plan. Plan 1 (the Interim Plan) was approved by the Environmental Board and signed by the Governor on March 8, 1972. Plan 2 (the Capability and Development Plan) was approved by the Environmental Board, the Governor, and the Legislature in April, 1973. Plan 3 (the actual Land-Use Plan) has been developed, rejected by the Legislature in 1974, and is now being redrafted.

The Development Permit System has been a successful innovation. It demonstrated that the adversary hearing system could be set up to control land use in the public interest much more rapidly than planning procedures and land-use plans could be put into place. It has provided a regional public forum for consideration of regional impact and environmental impact of large developments (over 10 acres or over 10 lots) for which towns have plans, and for all developments without town plans. It has provided a breathing spell permitting towns to develop land-use plans and supporting zoning and subdivision ordinances. It has stopped poorly planned developments and requires all developments to conform to the general public interest[1].

In some instances it has been uneven in performance, but it has worked

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Critical and constructive suggestions by Arthur H. Smith and H. William Smith are gratefully acknowledged.

much better than previous attempts to control land use through the planning-zoning process. I believe it is an indispensable institution to supplement and support local, regional, and state planning.

The first "Plan"--The Interim Land Capability Plan--(signed by Governor Davis, March 8, 1972) is a statement of environmental land-use goals designed for guiding planning. Its development was a vehicle for a very educational statewide debate on land-use planning. It provided preliminary guidelines for the nine district environmental commissions. It introduced environmental protection concepts into the permit system and into town plans.

The second "Plan"--The Capability and Development Plan--(signed by Governor Salmon in April 1973) was an expansion of the Interim Land Capability Plan. It continued the educational debate on environmental principles of land use. It provided more specific environmental criteria, concepts, and principles to guide district environmental commissions and town planning commissions. While it significantly furthered the goal of environmental planning, like the Interim Plan, it was not a state land-use plan.

The third plan required by Act 250--A State Land-Use Plan--was rejected by the legislature, as the residents are not yet ready for state planning.

Legal Status of Town Plans Under Act 250

Act 250 supplements the general planning act to give town plans a greatly strengthened legal status. A municipal plan, once properly adopted, becomes the official policy of the municipality with regard to future land use, growth, and development. Adoption of a municipal development plan is the only legal means available for a town to establish growth and land-use policies. The municipal plan provides the legal and planning basis for all town land-use controls. The Vermont General Planning Act (Title 24, Chapter 91) Section 4401 (a) states that: "All bylaws (i.e., zoning and subdivision regulations, official map, and capital budget) shall have the purpose of implementing the plan, and shall be in accord with the policies set forth therein." Act 250 requires that all developments or subdivisions be reviewed to determine if they are in conformance with 10 specific conditions. One of the conditions (Title 10, Chapter 151, Section 6086 (10)) is that the proposed development or subdivision "is in conformance with any duly adopted local or regional plan under Chapter 91 of Title 24." Application of this provision provides a regional experienced environmental commission with professional staff assisted by State agencies to hold a hearing to determine the broad public interest--town and State. This commission may disapprove an application on the basis of nonconformity with the town plan even without participation by town representatives. This procedure constitutes a vast improvement and strengthening of the machinery of police power to enforce provisions of a town plan.

Summary Appraisal of Act 250

The development permit system is an imaginative and invaluable institutional invention. It is, I believe, an indispensable supplement to the planning approach, as it makes the planning approach work more effectively.

While the development permit system does not create new plans in the public interest, it has been successful in stopping big bad developments[2]. Relief from the pressures of developers, in turn, permits good plans to be devised and implemented[3]. The development permit system provides the supporting concepts, enabling principles, and police power authority to make good local planning effective and implementable. This is especially relevant, since State Plan 3 has not materialized. Planning authority is still at the local level. Town planning has failed in the past as small rural towns lacked planning expertise and enforcement machinery. The development permit system brings the developer into an adversary hearing. At this hearing, experienced laymen sit as judges, and State experts give testimony. Plans 1 and 2, which are concept plans, are used to provide the criteria for consideration of a developer's proposal. Since Act 250 requires the developer to conform with the town plan, the town plan is enforced by the District Environmental Commission.

While Act 250 has made effective rural planning and zoning in the public interest possible, most planning commissions, regional and local, have failed to recognize this fact. They have paid little attention to Plans 1 and 2, as they are conceptual. They are waiting for the third plan which must include a map and be location specific. But Plans 1 and 2, when combined with the development permit system, provide a strong support for town environmental plans. However, to take advantage of this possibility, a new type of town planning and zoning is necessary. It must be tailored to rural conditions. It cannot be urban planning and zoning applied to rural areas as was done under the "701" program throughout the 1960's.

Because of the failure of urban planning and zoning in rural Vermont during the 1960's, a research project was developed at the University of Vermont to devise methods of planning and zoning relevant to rural areas (Research Project--Hatch 212). The result has been the development of new procedures, "environmental planning", and "environmental zoning"[4]. These procedures are based on goals expressed by the people of the community. Experimental environmental planning projects have been conducted in conjunction with town governments in 12 towns and cities with populations varying from 500 to 11,000. The new environmental planning has been followed in all of these towns. Environmental zoning has been prescribed and tested in four towns: South Burlington, Colchester, Chittenden, and Charlotte.

Environmental Planning

The environmental planning procedure is the reverse of urban development planning. Traditional urban planning has been development-oriented and has consisted of projecting population growth and job needs and providing zones for industry, commerce, and residential areas to accommodate the projected growth. Any area left over might be reserved for open space. The environmental planning procedure starts with an inventory of the natural resource base and an analysis of the suitabilities and carrying capacity of that base. A plan is made to protect natural areas, provide extensive outdoor recreation, and conserve soil and water resources. The area left over is allocated to industrial, commercial, and residential use provided the soils are suitable. This approach includes planning for controlled population and economic growth based on the carrying capacity of the land under current technology with respect to public goals[5].

Environmental Zoning

Environmental zoning is an equally sharp departure from conventional urban zoning. Urban zoning consists of dividing a municipality into districts and allocating specific uses to each district--residential, urban, commercial, industrial--and regulating such things as building height, lot coverage, lot size, setbacks, sideyards, and so forth, in each zone. Its objective is to protect land values by separation of land uses. Environmental zoning puts emphasis on conservation and protection of the natural resource base and growth control. The conservation zone is based on a natural resource base inventory and its carrying capacity. The conservation zones are designed to protect wildlife habitats, preserve water quality, prevent soil erosion, prohibit or restrict development on steep slopes, higher elevations, streambanks, and lakeshores.

A growth control plan is developed to permit growth at a rate no greater than the municipality's share of regional growth or its capacity to absorb growth. Growth control is accomplished by establishing two zones: a controlled growth zone and a restricted growth zone. The controlled growth zone consists of areas with municipal sewers and water, or soils and slopes suitable for buildings without destruction of environmental values, and in accordance with health department regulations for onsite sewage disposal.

The restricted growth zone consists of areas that do not have municipal sewers and water and are not suitable for building according to soil characteristics, health department regulations, and the principles set forth in the Act 250 Capability and Development Plan. It must be emphasized that this is not a no-growth policy, but a policy to permit a reasonable and assimilatable rate of growth. Environmental zoning does not include details concerning lot size, setback, and building height, and does not include exclusive land-use zones. Instead, it permits all non-nuisance land uses in the controlled growth zone, subject only to health regulations and conformity with the conditions set forth in Act 250[6].

Pilot Project Results

Environmental zoning based on environmental planning has been designed for four municipalities: South Burlington, Colchester, Charlotte, and Chittenden. In South Burlington (population 10,000), the controlled growth zone was the zone served by municipal sewer and water lines. The plan provides for the gradual extension of the controlled growth zone as sewer and water lines are extended. It prohibits intensive development in the restricted growth zone where soils are unsuitable for onsite sewage disposal until water and sewer lines are built or unless the sewer and water lines are provided by the developer at the developer's expense.

In the Town of Colchester (population 8,800), environmental planning and zoning led to a drastic change in the previously planned land-use patterns. The zoning, instead of being based on the assumption of continuous universal development, is now based on the assumption of maintaining open spaces, protecting agricultural land, and limiting development to the areas most suitable. The environmental plan and zoning shifted prime agricultural land from development zones to low-density agricultural zones,

thus temporarily relieving pressures on farmers to sell for nonagricultural land uses. The concept of industrial growth was not jettisoned. It has been enhanced by the environmental planning approach.

In the Town of Chittenden (population 650), environmental planning and zoning is being used to prevent developments on steep, fragile soils at higher elevations beyond the present town road system. These areas will be used for timber production and recreation.

In Charlotte, an even more restrictive concept is being followed. The whole town has been made a limited growth zone. This is justified and legally possible, as nearly all soils have severe limitations for onsite sewage disposal.

What is the possibility of environmental zoning being more effective than urban-type zoning? It is too early to draw conclusions, but there are some indicators. In rural towns in Vermont, landowners have generally and almost universally been opposed to any strict imposition of urban-type land-use zoning controls on their land. In our 12 pilot projects, we have found that rural landowners support environmental planning and zoning. This acceptance is based on several factors. It is less restrictive concerning land uses. It may be more restrictive from an environmental and land suitability point of view, but rural landowners recognize soil and slope limitations and are prepared to live with them. It is flexible and provides for changes in the growth zone. It is not antigrowth but is expected to improve the town's ability to attract industry and create jobs.

Growth Control

Environmental planning and zoning includes population growth control. This is necessary to prevent a big developer from overwhelming the public facilities of a small rural town. The principal support of growth control besides Act 250 and the Vermont Planning and Development Act is the New York Supreme Court decision in Golden v. Planning Board of the Town of Ramapo. From that decision we have learned that the growth control policy must: (1) provide for reasonable, normal growth, (2) not be discriminatory or arbitrary, (3) not be elitist[7], (4) be supported by a capital investment budget, (5) be integrated and built into the town plan from the chapter on goals through the chapter on implementation, and (6) be in conformity with regional and state growth policy. The requirement that a growth control plan not be elitist requires special attention and inclusion of two new concepts.

If the nature of the plan is to protect the environment and keep a quality environment for the lucky few who have the money to enjoy it, then it would be elitist and subject to question. It is necessary to provide internal evidence within the plan that is not elitist. This may be done by providing for (a) low-cost housing and (b) public access to public waters in a quality environment.

It is a major challenge for a small town plan to make serious provision for low-cost housing in the face of inaction by state and federal governments, but it can be done. This is the method used. The housing section of the plan may propose to require every developer to devote at least 5 to 10 percent of his acreage to low-cost housing[8]. Low-cost housing is defined

as houses that will sell for no more than $1,000 (in constant dollars) more than the cheapest houses sold in the county during the previous calendar year. This definition assures the developer that he can build low-cost housing at a profit. An additional requirement may be made that the 5 to 10 percent of the land in low-cost housing may be developed at double the density of the rest of the land. This would lead to increased profit to the developer and provision of twice as much low-cost housing for the town[9]. This formula for the provision of low-cost housing assures that the low-cost housing will be spread throughout the community and will not be relegated to a ghetto-like section of town. This provision will prevent the plan from being found to be discriminatory or elitist.

This low-cost housing concept was acceptable to rural landowners in Chittenden, a small hill town near Rutland, Vermont. In fact, many citizens were enthusiastic about the low-cost housing provision, as they look upon it as a device that will enable their children to stay in the town they love and not be crowded out by the more affluent home buyers from Rutland or megalopolis.

The second provision necessary to indicate that the plan is not elitist is to make, as a major thrust of the plan, a provision of public access to public waters and aesthetic and scenic qualities of the town. Fishing access and multiple-use water access for all streams, lakes, and ponds over 20 acres is included. A pedestrian trail network to permit anyone in town to walk to the identified and protected natural areas and scenic overlooks is also included. These provisions have been found to be acceptable to landowners in the 12 planning experiment towns and have led to significant implementation. South Burlington, previously landlocked, acquired a 100-acre park on Lake Champlain as a result of this planning procedure. Ferrisburg obtained a day-use area at a state park. West Farilee obtained a public lake access.

Conclusion

Environmental planning and zoning has been made possible by Act 250 which, in a real sense, provides the indispensable "enabling legislation," and conceptual framework. Before Act 250, it was not possible to persuade the town decisionmakers that the environmental planning and zoning was legal, especially in the face of statements by developers' representatives who argued that anything not specifically enabled by State statute was tacitly prohibited. Small rural towns are deficient in experienced municipal government leadership conversant with planning principles, planning law, and zoning and development problems. They can be overwhelmed by an outside developer who can hire expensive legal talent and put the selectmen on his payroll as bulldozer operators. Act 250 has changed that. It has provided a basis for a city like South Burlington, or a small town like Chittenden, to develop plans that will prevent big, bad developments and promote public access to a quality environment. It also provides a very strong second line of defense for the town plan. The Act 250 development permit hearing system requires the developer to argue his case before a regional commission where professional expertise can be provided to support the town's plans.

While experiments in 12 towns cannot be cited as conclusive evidence, these cases raise questions and hypotheses which should be subjected to

further testing. Was the success of environmental planning in the experimental towns the direct result of Act 250? Can environmental planning under Act 250 be generalized throughout rural areas or is it applicable only in towns with superior leadership? What role can the Extension Service play in generalizing environmental planning? What role can Extension area development specialists play? Can we expect environmental planning to be done by urban planners or can it better be done by a team of people from state agencies and university departments? Can we get an objective appraisal of environmental planning under Act 250?

These questions and many more I leave for you to consider and answer.

Footnotes and References

[1] This is most significant. The small town without a planning council does not have to face the well-heeled developer with expert legal counsel. The regional environmental commission is capable of handling this confrontation.

[2] "Big" developments are those that would increase a town population by more than 10 percent in a single year and would severely tax town facilities and/or require huge, unprecedented capital investments for schools, roads, road maintenance, etc. "Bad" developments are those that would endanger or destroy fragile environments such as roads on steep slopes at high (above 2,500 feet) elevations.

[3] F. O. Sargent, "Vermont's Experience in Land Use Planning," paper presented at AAAS annual meeting, San Francisco, March 1, 1974.

[4] Frederic O. Sargent, "Experiments in Rural Town Planning," Journal of the Community Development Society. Vol. 4, No. 1, (Spring 1973), 29-36.

[5] For a more complete description of environmental planning, see Frederic O. Sargent, "QEP--A New Method of Rural Planning," Journal of the Northeastern Agricultural Economics Council, Vol. 3, No. 1, (May 1974), 125-133.

[6] Before granting a permit, the district commission shall find that the subdivision or development is acceptable with reference to (1) air and water pollution; (2) existing water supply; (3) future water supply; (4) soil erosion; (5) highway congestion; (6) educational services; (7) municipal services; (8) scenic or natural beauty, aesthetics, historic sites, and natural areas; (9) conformance to state plans; (10) conformance to town plans.

[7] Elitism refers to improvement of the quality of the environment to the extent that land values rise and low and middle income people cannot compete in the housing market.

[8] For a representative low-cost housing procedure, see "A Quality Environment Plan for Chittenden," University of Vermont, Department of Resource Economics, 1974, mimeographed.

[9] It is not certain that the low-cost housing will be low-income housing, as many high-income people may choose to live in a smaller house with a smaller lot in a well-planned subdivision surrounded by houses on lots twice as large and costing four times as much.

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LAND-USE PLANNING - THE NATIONAL ISSUE

Schuyler Jackson

The issues revolving around land-use planning and regulation are complex and difficult. They are national in scope and significance. There are many respectable differences of opinion and philosophies concerning the subject; and there is, unfortunately, an equal amount of sloganeering and demogogery that has contributed little to public understanding of what is at stake. Many states are deeply involved in land-use planning. All will be to some degree within the next decade.

In 1970, the Vermont Legislature enacted the now well-known "Act 250" which created a system under which larger land development projects could be evaluated in accordance with 10 specific standards. In addition, Act 250 called for several plans to be prepared at the state level, the most important of which is a state land-use plan that is to "consist of a map and statements of present and prospective land uses which determine in broad categories the proper use of the lands in the state whether for forestry, recreation, agriculture, or urban purposes."

The debate of just exactly what a state land-use plan should be has been active, and there still is no general agreement on the matter. Extreme positions extend from those who advocate preemption of land-use planning at the regional or state level through some form of zoning for areas in which a transcending regional or state interest has been identified (higher elevations, floodplains, unique or fragile areas, etc.) to those who feel that all land planning and regulation should be left exclusively to each individual town, even to the point where the town may elect to exercise no controls whatsoever over land uses within its boundaries.

Upon failure of passage of a land-use plan last winter, a land-use study committee was created by the Vermont General Assembly. This committee is mandated to make a report to the next session of the General Assembly with recommendations for legislative action of a land-use plan under Act 250.

The committee has been meeting since May. Although progress has been understandably slow, some general agreement on basic concepts is emerging.

Schuyler Jackson is Chairman of the Vermont Environmental Board, Montpelier.

Mr. Jackson was unable to attend the conference to discuss Vermont's land use and development law (Act 250) but provided this statement for the Proceedings.

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The first formal action taken by the committee was the unanimous adoption of a resolution that the State and municipalities have a dual responsibility and duty to carry out detailed land-use planning and management. This resolution makes clear that the State's role is only proper when there is transcending State interest that cannot be properly taken care of at the local level.

This resolution recognizes two very important concepts. First, the use of Vermont's land cannot be left to happenstance; uncontrolled growth is not an acceptable option for the State, or alternatively, the public has an affirmative responsibility to assure that lands of the State are used through planning in a manner that is not contrary to the interest of the citizens of a community or the State. Second, the resolution recognizes that, in land-use planning, interests outside that of the individual town may be affected and if not adequately reflected in the local planning process, intervention by some yet-to-be-defined mechanism may be proper to protect those interests if legitimate and properly demonstrated.

The second task the committee has undertaken is the identification of guidelines for local planning - those issues a community should address when planning for future land use. The committee has agreed that a town in planning should address such matters as use of its agricultural lands, protection of areas of significant environmental concern, the housing needs of its residents, provision for lands for reasonable growth of the community, and so on.

Tough issues still remain before the committee: When do interests outside of a community have a legitimate role in the local planning process and decision making? How can these interests be expressed and conflicts with the local community be resolved? Are there areas in which the citizens of the State as a whole have interests that may transcend local interests and how should these interests be established? What should occur in those towns that disregard the interests of their neighbors or the region, and harm to themselves by scattered, irrational, or conflicting land uses can be demonstrated? What should be done, if anything, during the period when a town is planning to protect critical land areas?

These and other issues will be the topic of many more committee meetings and are a long way from resolution. However, it is clear that any recommendation of the committee will fully recognize that the major impetus for land planning, and most land-use decisions, will be made at the local level in those communities that choose to accept the responsibility - and opportunity - delegated to them under State law; that the regional and State entities only have a proper role when the local community ignores the interests of the larger community of Vermonters that each town continue as a socially, economically and environmentally viable component in the structure of the State; that land not be used in a way that harms others; that recognized natural resource values of the State, which we now enjoy and trust will be inherited by our children, not be destroyed for short-sighted and short-term ends.

Only those who would reject the value of the land and a commitment to the land for the future can disagree with the objectives first stated in Act 250 and now in the hands of the legislative committee. As the song goes, "This land is your land. This land is my land." It is the interests of both of us that are now at stake.

THE POLICY AND LEGAL MACHINERY OF THE ADIRONDACK PARK (NEW YORK) LAND-USE AND DEVELOPMENT PLAN

G. Gordon Davis

The Adirondack Park Land-Use and Development Plan (hereinafter "the Plan") is the planning blueprint which underlies the land-use regulation system being administered by the Adirondack Park Agency in New York State (hereinafter The Agency"). It was approved by the 1973 New York State legislature, signed into law on May 22, 1973, and became effective on August 1, 1973.

Policy Behind the Plan and Its Development

The Plan is the distillate of perhaps the most comprehensive and thorough regional studies ever performed in so short a time on so large a region. Its origins are found in the recommendations of the Temporary Study Commission on the Future of the Adirondacks established in September of 1968[1]. The recommendation emphasized the need for land-use planning and regulation for the private lands in the Adirondack Park (hereinafter "the Park"), to be undertaken and administered by an independent, bipartisan State agency.

At bottom, this recommendation for land-use planning and regulation was the product of two influences, one of long standing and the other quite new. The first was the special status of the Park in New York;[2] the second, the developing interest nationwide in regional land-use controls[3]. Together, these influences pointed toward a policy of regional preservation and protection with allowances for development and economic activity unique in New York and perhaps in the nation.

Consistent with the recommendations of the Temporary Study Commission, legislation was enacted in 1971 creating the Agency and setting forth the following initial Agency responsibilities:

> On or before January first; nineteen hundred seventy-three, the agency, in cooperation and consultation with local governments, shall prepare and submit to the governor and legislature for adoption or modification, in whole or in part, a land use and development plan applicable to the entire area of the Adirondack park, except for those lands owned by the state, together with recommendations of the agency for the implementation of such plan. For the purpose of meeting the foregoing requirement, the plan shall consist of a land use intensity area map and accompanying text described in subdivision two of this section.[4]

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Interim controls over land use and development were employed as a holding action pending completion and adoption of the Plan[5].

From September 1, 1971 until December of 1972, the Agency staff continued its research and analysis of the private lands of the Adirondacks. There was devised a system of land-use classifications graphically displayed upon a map of the region. The classifications were based upon natural resources, existing land use patterns, and public and social considerations[6].

Out of this process came the official Adirondack Park Land Use and Development Plan Map ("the Map") which was adopted by the Legislature as part and parcel of the Plan[7].

The underlying policy of the Plan is achievement of a balance between development and preservation. The statement of legislative findings and purposes found in the legislation should be given close analysis. A number of seemingly disparate threads are brought together therein. The combination of the unique natural resources of the Park, its open space character, the historical significance of the Adirondack forest preserve, the complementary crazy-quilt relationship between public and private lands in the Adirondacks, the awakening public concern for unchanneled growth and development, and the need for a strong economic base all combine in support of a regional planning policy[8]. In addition, a continuing role for land-use controls at the local level is to be maintained and strengthened.

The Plan's Machinery

The Plan has four principal elements. First, it classifies the private lands in the Park by map and imposes development intensity limitations upon them. These limitations are expressed numerically as principal buildings per square mile. The figures, called "overall intensity guidelines," vary as a function of land classification[9]. Thus, development intensity becomes a function of the development suitability of the land in question, and permissible growth is channeled into the more amenable areas. Second, it establishes a permit system for certain projects deemed to be of regional significance by reason of potential impact upon Park resources[10]. In connection with its review of proposed projects, the Agency must make certain findings and draw certain conclusions, and based upon them, may approve the project, conditionally approve it, or disapprove it[11]. Third, the plan establishes restrictions for development and subdivision involving shorelines, including minimum lot widths, minimum setbacks, vegetative cutting restrictions, and the like. "Shoreline" is defined to include property bordering Adirondack lakes, ponds, streams, and rivers[12]. Fourth, the plan contemplates intensive local planning at the town and village level and provides machinery for assumption by these local governments of review of a substantial percentage of those regional projects theretofore reviewed by the Agency once the town or village's local use regulations are approved by the Agency as being in conformity with the Plan[13].

Land Use Areas and Intensity Guidelines

The land classification nomenclature employed in the Plan speaks of uses. This could be misleading, at least to the extent that it implies conventional use allocations in conventional Euclidean[14] zoning districts. In fact, the land area concepts employed in the Plan are less designed to segregate uses than they are designed to control density of development, and no uses are flatly outlawed anywhere. The Plan speaks in terms only of "compatible uses."

There are essentially three categories of land areas under the plan: three types of zones into which the principal development pressure shall be channeled[15], two types of zones given over to preservation of the park-like attributes of open space and natural and scenic phenomena which can accommodate very little development pressure[16], and one type of zone expected to accept the new industrial development in the Park[17].

Where the Agency (or, in time, a local government with an Agency-approved local land-use plan) has review jurisdiction over a particular project, the overall intensity guidelines establish a ratio between new buildings and acreage[18]. The large lot zoning aspects of the guidelines (and, indeed, the minimum lot size criteria which govern review jurisdiction) hardly break new ground in police power regulation[19]. Yet the flexibility built into their application can inherently avoid hardship and promotes a creative ad hoc approach to development planning unavailable with the more simplistic minimum lot size approach, which maximizes attention to the unique topography and other factors of a given development site. Under the guidelines, the question is one of average lot size. Moreover, in practice, the guidelines produce results not unlike transferable development rights.

The Regional Project Permit System

A given land use or development or subdivision of land may be subject to Agency project review jurisdiction. Whether it is depends upon the answers to the questions "where," "what," and "how many."

If a proposed land use or development or subdivision will occur in one of several statutorily described critical environmental areas, it must be reviewed by the Agency and a permit issued, irrespective of its nature[20]. Critical environmental areas differ somewhat, depending upon the land classification as "hamlet area," "resource management," or whatever. Essentially, however, critical environmental areas are wetlands, strips of land near wild lands owned by the State, strips along rivers and roads, and areas at high elevations[21].

Even though not proposed for a critical environmental area, a proposed activity may be subject to review jurisdiction, depending upon its nature or character. Thus, for example, a mobile home court proposed within a low-intensity use area is subject to Agency review and so is a ski center proposed within a moderate intensity use area[22].

Finally, although an activity is not subject to jurisdiction by reason of its proposed location in a critical environmental area or by reason of its nature or character, its size may subject it to jurisdiction. Thus a

motel of 100 units proposed within a hamlet area is reviewed, as is a subdivision of five or more lots proposed for a rural use area if each lot meets minimum lot size criteria, and as is a two-lot subdivision in the same location if one lot fails to meet the minimum size[23].

If a proposed activity is subject to jurisdiction, the Agency reviews an application submitted by the project sponsor and conducts an on-site investigation of the site to arrive at its findings. Perhaps the most diversified of its undertakings in this connection is its environmental impact analysis[24]. Guided by a series of key considerations statutorily outlined[25], this endeavor ranges from predictions of cultural eutrophication of bodies of water and examinations of the site for possible habitats of - and concomitant risks to - bog turtles, showy lady's slippers, and other rare, endangered and unique species, to cost-benefit analysis of local governments' financial abilities to supply needed municipal services to the project[26].

The Agency is empowered to conduct public hearings on projects and may not disapprove a project without a hearing[27]. Public hearings on projects function as an important forum for public airing of development grievances and environmental concerns, and the Agency has a practice of holding hearings on all controversial projects regardless of size.

The Agency's authority to impose conditions upon approvals occupies the full ambit of the police power[28]. Typical Agency exercise of that authority has included limitations upon aspects of development potentially visually injurious to pristine sites, such as disapprovals of boat docks and boathouses, vegetative cutting restrictions, screening requirements, and the like. In addition, the Agency has frequently imposed engineering solutions to potential environmental problems such as erosion and eutrophication. Of great importance, moreover, is the Agency's statutory authority to require that necessary services be underwritten by the developer, with the local government the direct beneficiary[29], a power that outstrips authority delegated to local governments under traditional zoning and subdivision control enabling legislation.

Permits issued in respect to regional projects are recorded in the county clerk's office, furnishing an indelible record. Compliance is assured through the Attorney General. Moreover, though no court has as yet explicitly so ruled, provisions in Agency permits should be enforceable by private citizens[30].

Shoreline Restrictions

Bearing in mind that by no means all land uses and developments and subdivision fall within the ambit of Agency project review jurisdiction, it is well that special shoreline restrictions designed to protect Adirondack rivers, lakes, ponds, and streams apply by operation of law in all cases[31].

The shoreline restrictions include minimum setback requirements for both buildings and septic tank leach fields (and seepage pits). They include minimum lot width restrictions. They impose vegetative cutting restrictions. They limit deeded and contractual access to water bodies as

a function of overall shoreline footage. They encourage clustering and preservation of open space along water bodies[32].

Local Land-Use Regulations

Perhaps the most unique characteristic of the Act is its stop-gap aspect regarding local planning and zoning. The Agency exercises review authority over much development and subdivision activity traditionally the subject of local regulations. In the Adirondacks, only a few towns and villages had exercised their planning and land-use regulation prerogatives when the Act became effective, and hence the Plan is at present the sole regulatory scheme in effect for much of the region.

It is not contemplated, however, that this situation will obtain indefinitely. Whereas the Plan was fashioned at a rather coarse scale, consistent with regional planning objectives, the natural resources, existing land-use patterns, and public and social considerations of the Park require much more detailed analysis and planning for the job to be considered complete. In fact, the intense and detailed planning and regulation commonly effected by local governments is badly needed in the Park. It is the policy of the Act to encourage and support local governments in finishing the job[33].

A local government may proceed to enact its own local land use program, consisting of a use and permit ordinance, subdivision regulations and the like, which become effective immediately upon enactment[34]. However, the local government may become virtually the exclusive reviewing authority of many categories of regional projects, known as "Class B regional projects"[35], and may become a full partner with the Agency in the review of many others, known as "Class A regional projects"[36], by submitting the local land-use program to, and obtaining approval of, the Agency[37]. Thus, at such time as a local land-use program is approved, land-use regulation under the police power is shared by the local and regional entities.

Conclusions

The Adirondack Park Agency, with overall responsibilities to administer the Adirondack Park Private Land Use and Development Plan, has a mandate to share land-use regulation authority with those local governments in the Park which have achieved sound planning and regulation programs consistent with the policy of the Plan. By means of the partnership between the Agency and local governments, all projects of regional scope and significance are subject to density limitations, environmental constraint, and special shoreline property restrictions designed to preserve and protect the park-like character of the Adirondacks for generations to come.

Footnotes and References

[1] The Adirondack Park, the boundaries of which are set forth in E.C.L. § 9.0101, contains portions of twelve counties and encompasses some 6 million acres, of which approximately 60 percent is privately owned and the balance State owned. The land area is approximately the size of the State of Vermont. The studies resulted in a principal report, "The Future of the Adirondack Park", containing the 181 recommendations of the Commission, and seven "Technical Reports", concerning the land, wildlife, forests, minerals, water and air, transportation and economy of the region, local governments, and other issues. Reprints of the reports are available from the Adirondack Museum, Blue Mountain Lake, New York.

[2] The region of the Adirondacks was statutorily singled out as a "Park" in New York as long ago as 1892. (New York Constitution of 1895. See also Conservation Law of 1911, c-647, §§3-0121 and 3-1901.) The Park contains a substantial fraction of the State's "forest preserve" to be "forever kept as wild forest lands." (N.Y. Const. Act. 14 § 1.)

> "They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed." (Ibid.)

All lands within the Park owned by the State are "forever reserved and maintained for the free use of all the people..." (E.C.L. § 9.0301 [1]. All off-premises advertising signs in the Park must be approved by the Department of Environmental Conservation in order that the aesthetic nature of the Park not be impaired. (E.C.L. § 9.0305). Construction of and improvements to roads by certain towns in the Park which contain a large percentage of forest preserve must be approved by the State Comptroller. (Town Law § 202 [f] [5].

[3] See, e.g., Fred Bosselman and David Callies. The Quiet Revolution in Land Use Control, prepared for the Council on Environmental Quality (Washington, D.C.: Government Printing Office, 1972; and Model Land Development Code of the American Law Institute, Proposed Official Draft No. 1 (April 15, 1974).

[4] Former Executive Law § 805 (1), added L. 1971, c. 706, § 1, effective September 1, 1971.

[5] Former Executive Law § 806, added L. 1971, c. 706, § 1, effective September 1, 1971. Pursuant to interim rules promulgated by the Agency, review jurisdiction was exercised over land uses and developments and subdivisions involving 5 or more acres, or 5 or more lots.

[6] The Land Use Area Classification Determinants used in this process were given detailed description in an Appendix to the "Adirondack Park Preliminary Private Land Use and Development Plan," a document disseminated by the Agency to give public exposure to the planning effort prior to public hearings thereupon. In shorthand form, they are: soils, topography, water, fragile ecosystems, vegetation, wildlife, Park character, public facilities, and existing land use.

[7] Executive Law §§ 805 and 810, added L. 1973, c. 348, § 1, effective August 1, 1973.

[8] Article 27 of the Executive Law, the Adirondack Park Agency Act (hereinafter "the Act"), contains a formal statement of findings and purposes (Executive Law § 801).

[9] See Executive Law § 805. For the "resource management" land classification, the overall intensity guideline is 15 principal buildings per square mile; for "rural use", 75; for "low intensity", 200; for "moderate intensity", 500; no intensity guidelines apply to "hamlet" or "industrial use" areas.

[10] See Executive Law §§ 809 and 810. The kinds of projects deemed of regional significance are also functions of the land-use classification.

[11] The findings and conclusions include a determination that the project is consistent with the overall intensity guidelines; that it is in conformity with the area, setback, and other restrictions applicable to shorefront lots if shoreline is involved; and that it would not result in "undue adverse impact" upon the resources of the Park (Executive Law § 809 [10]). The Agency may qualify an approval with such requirements and conditions as may be necessary to meet the intensity guidelines and the shoreline restrictions and as are needed to avoid undue adverse impact to the full limit of the police power. In New York, this police power includes regulatory authority over aesthetics. See People v. Stover, 12 N.Y. 2d 462, 240 N.Y.S.2d. 734 (1963); Cromwell v. Ferrier, 19 N.Y.2d. 263, 279 N.Y.S.2d. 22 (1967).

[12] Executive Law §§ 806 and 802 (56).

[13] See Executive Law §§ 807 and 808. The genius of the Act is its recognition that certain regulatory functions are best performed at a regional level and certain others at a local level. This point is elaborated under "Local Land Use Regulations", infra.

[14] Euclid v. Ambler Realty, 272 U.S. 365, (1926), has lent its name to the traditional approach of subdividing a municipal jurisdiction into districts differentiated by the uses permissible therein.

[15] The "hamlet areas," congruent with established communities, are characterized by intensive existing development and relatively highly developed public services and facilities. Hamlet areas are expected to accommodate much of the Park's future development. All uses are compatible with the hamlet area concept (Executive Law § 805 [3] [c]). The "moderate intensity use areas," most generally adjacent to hamlet areas or otherwise associated with relatively intensive existing use, have few physical development limitations and are expected to accept major future residential expansion and other development (Executive Law § 805 [3] [d]). The "low intensity use areas" have reasonable proximity to hamlet areas, and although

they may have some development limitations, they are nevertheless amenable to development at a decreased density (Executive Law § 805 [3] [c]).

[16] The "rural use areas" and "resource management areas" present rather severe development limitations and at the same time exemplify the open space and natural and scenic qualities so important to the park-like atmosphere of the region. These areas are given protection from intense development (Executive Law § 805 [3] [f] and [g]).

[17] The "industrial use areas" reflect existing and prospective areas of industrial and mineral extraction activity. Executive Law § 805 (3) (h).

[18] Although the guidelines only apply in the event a project is subject to review jurisdiction, a subdivision must meet certain minimum lot size criteria to escape jurisdiction in most cases. Executive Law §§ 809 (10) and 810. For quantification of guidelines, see fn. 9, supra.

[19] Two points are in order. First, in resource management areas, the guidelines call for average lot sizes of 42.8 acres and in rural use areas, 8.5 acres. These "large lots" differ in size but not in concept from those validated in such cases as Levitt v. Village of Sandy Point, 6 N.Y. 2d. 269, 189 N.Y.S.2d. 212 (1959). Second, any hint of exclusionary zoning is dispelled by the fact that the Plan is regional, affording ample areas for expansion at all economic levels. Even the dissent in Golden v. Town of Ramapo, 30 N.Y.2d. 359, 334 N.Y.S.2d. 138 (1972), recognizes that problems not appropriate for localities to solve may be addressed by regional or state authorities (30 N.Y.2d. at 385 and 391).

[20] This assumes that the activity meets the statutory definition of "land use or development," i.e. that it will materially change the use or appearance of land or a structure or will materially change the intensity of use thereof (Executive Law § 802 [28]).

[21] See Executive Law § 810.

[22] Ibid.

[23] Ibid.

[24] Executive Law § 809 (10) (e).

[25] Executive Law § 805 (4).

[26] The ingredients of environmental impact analysis inevitably vary in this relation to many factors, such as the unique topography and other characteristics of the land in question and the particular uses to which it will be put. The statute has anticipated two important areas of potential administrative vulnerability by enabling the Agency to insist upon

such ad hoc information as is reasonably necessary for evaluation on a project-by-project basis (Executive Law § 809 [2] and by preventing project sponsors from gerrymandering their projects through the use of subsidiary corporations or other controlled persons so as to avoid or obstruct a comprehensive review of environmental impact (Exective Law § 802 [63]),

[27] Executive Law § 809 (3).

[28] "The Agency shall have authority to impose such requirements and conditions with its granting of a permit as are allowable within the proper exercise of the police power" (Executive Law § 809 [13]).

[29] Ibid.

[30] It is well established with regard to zoning regulations that an adjoining or nearby property owner whose property is adversely affected by a violation is within equity jurisdiction with standing to sue if he can demonstrate special damages, or if special damages can be inferred. See Cord Meyer Development Co. v. Bell Bay Drugs, 20 N.Y.2d. 211, 282 N.Y.S. 2d. 259, (1968); Lesron Junior v. Feinberg, 13 A.D.2d. 90, 213 N.Y.S.2d. 602 (1st Dept. 1961); Inserra v. Cimino, 17 Misc. 2d. 883, 187 N.Y.S;2d. 821 (Sup. Ct. Oneida Co. 1958).

[31] Executive Law § 806.

[32] Ibid.

[33] Executive Law §§ 801, 807, and 808.

[34] Note that unlike the scheme in Article 7 of the ALI Model Land Use Code, which places local ordinances in abeyance until approved by the State Land Planning Agency, the Act expressly allows for local regulation parallel to and independent of itself (Executive Law § 818 [1]).

[35] Executive Law §§ 807 (f), 808 and 810 (2).

[36] Executive Law § 810 (1).

[37] Criteria for Agency approval of the local land-use program include findings that Class B projects will be reviewed for environmental impact, that the overall intensity guidelines in effect for the land classifications of the Plan have been employed so as to preserve the overall density limitations, and that the shoreline restrictions of the Plan will be enforced (Executive Law § 807).

HIGH IMPACT ZONING: MAINE'S SITE LOCATION ACT

Johannes Delphendahl

This paper is divided into three sections: a brief introduction describing the circumstances that generated public support for the Site Location Act; the provisions of the act; and an evaluation of the legislation.

Brief History

The Site Location Act became effective January 1, 1970. The Legislature reacted to the recognized pressure of possible development in many areas of Maine. This developmental pressure was particularly evident in the coastal region. Several proposals for possible location of oil refineries, aluminum smelters, and the development of an oil-port had been publicized. The Legislature recognized that the State of Maine has the responsibility for the economic and social development of the State. Thus, the Legislature, in the preamble to the Act, asserted the State's responsibility for commercial, industrial, and recreational development (or in broad aspects for all phases of development) that may effect the people and the natural environment. Using the police power, the Legislature enacted the Site Location Act and thus empowered the State to regulate the location of development involving land resources.

The Site Location Act

The Act is administered by the Board of Environmental Protection, which is composed of 10 members and one chairperson, each representing a segment of the population affected by the possible development. The composition of the Board is:

1 Chairperson:	the Commissioner of the Department of Environmental Protection (ex-officio, votes only in case of tie vote)
2 members:	air pollution experts
2 members:	public at large
2 members:	conservation
2 members:	industrial-commercial
2 members:	municipalities

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Scope of the Act

Approval is required for:

1. development of a land or water area in excess of 20 acres;

2. drilling or excavating natural resources (on land or under water) in excess of five acres;

3. developments on a single parcel of land - structures in excess of a ground area of 60,000 square feet;

4. subdivisions - the division of a parcel of land into (1) five or more lots, (2) any one of which is less than 10 acres and (3) if the lots make up an aggregate land area of more than 20 acres, and (4) are to be offered for sale or lease to the general public during any five-year period.

Administration of the Act

The prospective developer must file an application for project approval. The application includes a site plan, a soil map, and proof of ownership (deed) of the land area to be developed. Furthermore, technical details of the proposed development, and data on water supply and waste discharge (water and air) are required as part of the application.

The Board must, within 30 days of receipt of the application, take one of the following courses of action:

1. approve the proposed development with or without condition;

2. disapprove the development - the reasons must be public;

3. schedule a public hearing to hear testimony to determine whether the proposed development will substantially affect the environment or pose a threat to the public's health, safety, or general welfare.

The Law specifies that the Board must consider these five areas when acting on an application:

1. the financial capacity of the applicant to carry out the project proposed in an acceptable manner, as stated in the application;

2. adequate provision for traffic movement to and within the proposed development;

3. the impact of the project on all aspects of the natural environment, including the quality of the land resources, air, water, and general quality of life in the surrounding area;

4. the suitability of the soils on the proposed site to accept the type and intensity of development proposed;

5. whether the public's general health, welfare, and safety has been adequately protected.

It should be noted that the Law places the burden on the developer of proving to the satisfaction of the Board of Environmental Protection that all of these criteria have been met. To meet this burden of proof, the prospective developer must submit the application and appropriate data to substantiate that the criteria have been met. The scope of the application may range from a relatively simple form for a subdivision of 20 acres, to a substantial document in the case of an application for the possible location of an oil refinery.

Evaluation

In Table 1 the number of applications processed is summarized.

TABLE 1

Applications Under Site Selection Law Fy 1970-1974

	Fy 1970	Fy 1971	Fy 1972	Fy 1973	Fy 1974	Total
Received	5	63	106	102	189	465
Approved	5	58	100	82	152	397
Withdrawn	0	3	3	0	5	11
Denied	0	2	3	20	32	57
Public Hearing Held	0	11	26	11	7	55

Source: Department of Environmental Protection, Augusta, Maine

Approximately 87 percent of the applications during the past four years were approved. Public hearings were held on 12 percent of the applications. Publicity relative to the hearings was concentrated on applications for the location of oil refineries either at Machias, Eastport, Searsport, or Portland. During Fiscal Year 1974, only seven hearings were held, though 189 applications were received. The Site Selection Act is truly a "legal landmark" because the State has taken the responsibility for guiding statewide development. Two acts related to land use were recently passed by the Legislature: the zoning of unorganized townships (L.U.R.C.) and the Shoreland Zoning Act.

But the State of Maine lacks a comprehensive land-use plan. Thus, decisions relative to the location of development under the Site Location Act may be considered "spot" zoning without the guidelines of a comprehensive plan.

If an application is filed and the provisions of the law are met, the law states that the Board shall approve a developmental proposal whenever it finds that:

1. the developer has the financial capacity and ability to meet the State air and water pollution standards;

2. provisions are made for traffic movement;

3. that the development will not adversely affect the natural environment;

4. soil types are suited to the development.

If these conditions are met, the application must be approved.

As of October 1974 no site application filed by various firms to construct an oil refinery has been approved, because the conditions stipulated in the law have not been met.

In summary, it should be stressed that the Site Location Act provided the State with a legal tool to control development which may affect the people or the natural environment of the State. It is hoped, however, that a comprehensive land-use plan will be enacted in the near future which then may be used to supplement the decision-making function of the Board of Environmental Protection.

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DELAWARE'S COASTAL ZONE ACT

David R. Keifer

In June of 1971, the Delaware General Assembly passed a piece of innovative legislation - the Delaware Coastal Zone Act. Passage of this legislation was heralded in articles and editorials across the country. The implementation of the Coastal Zone Act has been both heralded and damned within the State of Delaware. Last winter's energy crisis raised serious questions about the use of the Coastal Zone Act.

The primary goals of the legislation were to:

1. preserve and improve the quality of life and the quality of marine and coastal environment for recreation, conservation of natural resources, wildlife areas, aesthetics, and the health and social well being of the people;

2. promote the orderly growth of commerce, industry, and employment in the coastal zone of Delaware compatible with the first goal;

3. increase the opportunities and facilities in Delaware for education, training, science, and research in marine and coastal affairs.

The Coastal Zone Act does not prohibit all industries in the coastal zone; merely heavy industry, which is defined "as those that are incompatible with the protection of the natural environment". It further defines the characteristics of heavy industries as those that:

1. use more than 20 acres;

2. use smoke stacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment, and waste treatment lagoons.

The Coastal Zone Act leaves to the State planner and the Coastal Zone Industrial Control Board establishment of specific guidelines as to which industries are acceptable within the coastal zone. Since the act was passed, regulation of industrial development within the zone has been achieved through a system of permits issued by the State Planner for the expansion of existing industries or the development of new industry within the zone.

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The State Planner has ninety days to grant a permit outright or to grant a permit subject to conditions or to deny a permit. His decision can be appealed to the State Coastal Zone Industrial Control Board, and the Board's decision can be appealed to the Superior Court.

In the period July 1972 through June 1973, the State Planner received 24 status decision applications. Twenty-two status decisions were given; one of these was appealed to the board, and two recent applications are awaiting decisions. During this same period there were three permit applications, two decisions to grant permits, no permit decision appeals, and one decision is pending on a recent application.

The Coastal Zone Industrial Control Board has acted as an appeals board to deal with decisions by the State Planner based on his interpretation of the intent of the act. The board has heard 4 status decision appeals and has upheld the State Planner in 2 of them. One was withdrawn prior to a decision by the board. One of the basic failings of this system has been the fact that the act defines heavy industry on the basis of historical pollution data rather than on the new pollution abatement technology. Industry feels it is being unjustly kept out of the coastal zone.

The State Planning Office in accordance with the legislation has, with the aid of a consultant, further defined heavy industry, investigated industry characteristics and processes in order to develop a uniform system for rating one industry against another in terms of likely impact on the coastal zone, and established guidelines for acceptable types of manufacturing uses within the coastal zone. A plan for the zone has also been developed. The preliminary coastal zone plan is both a land development and regulatory document. It contains goals, objectives, and development concepts with application to the zone and to the State in general. It also recommends specific development policies and strategies for the coastal zone, including a land-use plan for the various sub-regions of the coastal zone. The two proposals have been put before the public during a series of hearings within the three counties. The Coastal Zone Industrial Control Board now has these items under advisement and must adopt or reject the definitions, guidelines, and land-use plan.

The State is currently developing a comprehensive coastal zone management program which probably will include an updating of the preliminary coastal zone plan and development of broadened State development authority in the zone, as a result of detailed inventories and evaluation activities.

This work is a part of Delaware's participation in the National Coastal Zone Management Program, for which we have been designated as the official Delaware liaison. Our office will have both a managerial and a major technical study responsibility in this program.

The management program to be developed as outlined in our application to the U.S. Department of Commerce under the Federal Coastal Zone Act of 1972 includes among its objectives: (1) development of criteria for evaluation of uses of the coastal zone; (2) determination of compatibility and appropriate mixes of uses in the zone; (3) provision of a centralized focus for coastal zone management and concern; (4) structuring of a mechanism for interagency and intergovernmental coordination and reconciliation of coastal issues. The work program emphasizes the development of managerial informa-

tion and techniques, not scientific data, so that every unit involved in coastal zone decision-making can benefit from a useful data base and a common set of parameters.

Although the tone of the Coastal Zone Act is definitely intended to preserve the physical environment and overall quality of life in the zone, it also recognizes that part of the quality of life is economic viability, in order to promote economic prosperity as well as preserve environmental quality. Allowable economic activities must be screened carefully. The first step in this process is to identify those industries with a definite reason and need for locating in the coastal zone.

The coastal zone of Delaware has definite boundaries as defined by the act, but the area is also part of a larger socioeconomic region defined, not by political boundaries, but by functional interactions. For example, Dover is not physically part of the coastal zone, but it certainly dictates the economic viability of the coastal zone areas in Kent County. Therefore, it is not absolutely necessary for a plant to locate in the coastal zone in order to provide jobs and income to residents of the zone. Thus, a plant considering a location in Kent County can benefit the entire county by locating in Dover. If there is no economic need for locating in the zone, equal economic benefits for zone residents can be realized by the plant being located outside the zone.

On the other hand, some industries may need, require, or be ideally suited to the coastal zone. If locations in the zone cannot be obtained, such industries may not locate in Delaware at all. In this case, industry should be evaluated for its compatibility with the purposes of the Coastal Zone Act. If an industry does not require a coastal zone location, it should be encouraged to locate in another part of Delaware.

The reactions of industrial representatives during the public hearings were generally negative. Industry and labor interests contend that the use of historical data does not take into account the improvements made through research to reduce or almost negate the potential to pollute. The act as it was passed prevents industrial uses that may pollute if anti-pollution equipment should break down. It fails to balance the needs of industry, labor, the private citizen, environmental quality, and sound economic development. Through the public hearings we have learned that we may have to compromise on certain definitions and guidelines and on the land-use plan for the coastal zone.

The Coastal Zone Act specifically forbids offshore gas, liquid, solid, or bulk product transfer facilities within the coastal zone. However, offshore continental shelf oil and gas development are a distinct possibility in light of last winter's "energy crisis" and the possibility of further problems this winter. This could have a definite impact on the character of the coastal zone.

In 1970 coastal zone land and water usage consisted of:

10% of the land in residential use;

1% in commercial use;

1.5% in industrial use;

87.5% in all other uses, including agriculture, woodland, wetland, wildlife management, and parkland.

In 1970, according to the Technical Report of the Delaware Bay Oil Transport Committee, there were 44,555 acres of public outdoor recreation land in the coastal zone (out of 62,431 acres statewide). This included three federal wildlife refuges, five state parks, twenty State Fish and Wildlife management areas, and two municipal parks.

In addition, approximately 3,600 acres of land in and near Lewes is held in public trust, and private conservation groups such as Delaware Wildlands hold about 8,100 acres of coastal zone land.

By the year 2000, State-owned recreation land is expected to more than double, and combined federal and State ownership in the coastal zone is expected to reach 82,000 acres, compared to 44,000 acres today.

In the water of Delaware Bay there is substantial acreage of State subaqueous land leased for private shellfish production. Sport fishing is a major form of recreation in the Delaware River and Bay and the tributaries south of Delaware City.

Recreation demand in the coastal zone is high and continues to grow. In 1970, State park attendance in the coastal zone attracted three and one-half million visitors, about 50 percent of whom were out-of-state visitors. Delaware's outdoor recreation resources are available to 45 million people within one day's driving time of the State.

Of the total 115-mile Delaware shoreline, 97 miles are considered suitable for recreation.

The road density, that is miles of roadway per square mile of land area, in the coastal zone is substantially less than in inland Delaware. In addition, with the exception of a few major roads, coastal zone roads have design qualities limiting them to light traffic (average daily traffic volumes of fewer than 100 vehicles) and are not suited to intensive traffic volumes associated with industrial or commercial use. The recreation value of Route 9 in New Castle and Kent counties in terms of scenic value and historic heritage was particularly noted by the Governor's Task Force on Marine and Coastal Affairs, which proposed that there be a plan for protecting scenic and historic attractions such as the Route 9 corridor.

Given the impacts of the energy crisis and the federal government's views on off-shore oil and gas operations, the potential conflicts between the oil and gas industry and petro-chemical plants on the one hand, and residential, resort, and recreation land uses, wildlife management, environment conservation, historic and scenic values, on the other hand are apparent and very serioud. The conflicts between an oil refinery or tank farm and an adjacent residential area, public park, or wildlife area cover a spectrum from environmental pollution hazards and aesthetic quality deterioration to availability and values of land and excessive demands made on roads and other public services.

It was to avoid these conflicts that the General Assembly enacted the Coastal Zone Act. Any large-scale production of offshore oil or gas near Delaware would most likely create pressure to amend this law to allow onshore storage and refining facilities and other related onshore industries to locate in Delaware's coastal zone. If the offshore oil and gas industry becomes established on the Middle Atlantic Continental Shelf, it is likely that Delaware will have to face up to the question of continuing its present regulatory policy or changing it to accommodate to the onshore needs of that industry.

The real test of economic impact will be how many jobs for unemployed Delawareans will be provided, or how much the income level of our labor force will be raised.

Several types of problems have come to light since the passage of our Coastal Zone Act. The first set of problems deals with governmental relations - particularly the question of the state government getting into the zoning business after historically delegating this role to local governments. The Delaware Coastal Zone Act did not take any power away from local governments in the statute. Rather, it imposed a State agency in the bureaucratic process and gave that agency veto power. It set up administrative power for the development of a plan but did not provide for legislative adoption of the plan in a manner similar to local zoning where the governing body adopts a zoning ordinance.

Another problem with the Delaware act is that it does not contain a clear definition of prohibited heavy industry. It prohibits various activities based on general traditional characteristics and assigns final authority to an appointed official (the State Planner) and an administrative board (the Coastal Zone Industrial Control Board).

The final problem, and perhaps the one with the most long-term significance, is that the act and associated publicity put forth the impression that Delaware was stopping industry in the coastal zone, and hence we were against growth. In fact, much of the coastal zone is not suitable for any kind of industry. In some areas, the resort industry would make other industries unfeasible.

The State of Delaware needs to have the Coastal Zone Act survive the problems it now faces. We must review what has happened with the act during its lifetime and determine how to best protect our natural resources, while providing sites for the industrial development needs to keep Delaware prosperous.

The decisions reached must be backed up by prompt action on the part of the State and all the local jurisdictions involved - if we are to be successful in reaching our goals.

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FLOOD RISK MANAGEMENT -- LESSONS IN INTER-GOVERNMENTAL ENVIRONMENTAL AND LAND USE CONTROL

David J. Allee

Recent changes in flood risk management programs -- many in response to the record 1972 floods -- should provide experience useful to a wide variety of environmental problems where land-use controls seem to be at issue. There is a general trend toward expanding the authority of higher levels of government in an effort to increase the consideration of regional, statewide, or national values and reduce the parochial influence of local governments. The recently defeated National Land-Use Policy Act might have moved the nation in this direction on a very broad front. As Bosselman and Callies (1972) point out, many states have adopted a variety of forms of regulatory measures that fit the trend.

This paper will review recent changes in the federal flood insurance program that add new sanctions for regulation of land use in the floodplain. These will be placed in context, with regard to other measures to manage flood risk and with regard to the general problem of inter-governmental influences on land use. Special attention will be given to the potentially key role of the state as exemplified in particular by the complementary legislation passed by New York but developed in a number of other states as well.

Individuals and communities that occupy the floodplain, acting as separate decision makers, have many incentives to take actions that actually increase the overall risk of flood damage. In spite of millions of dollars spent on flood prevention, flood damage figures seem to increase over the years. A climax came in 1972 with Tropical Storm Agnes, the Rapid City disaster, floods on the Mississippi and in the Pacific Northwest. Losses were in the many billions, with over 350 lives lost and unmeasurable private suffering.

Building in the floodplain not only poses a risk for the individual but often increases the risk for others. Urbanization can increase the amount and speed of runoff by reducing infiltration. Filling and building

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too close to the river can cause a previously harmless flood flow to back up and flood much more property. Doing with "yours" or "mine" what we choose can make what is "ours" much more of a problem. The solution is to undertake a variety of public and private actions so that together the risk of flood losses is reduced to more tolerable levels.

Broad Strategies -- Relief, Flow, Location

In response to disasters, such as major floods, the nation has evolved a series of relief measures impressive in scope and generosity. Indeed, some who have studied the provisions seem to conclude that a community can't afford not to have a flood. Obviously, some victims would prefer not to have had the honor of being chosen. But the outpouring of assistance to put things back the way they were is one way we spread the risk. Indeed, the cost of flood recovery has been an important incentive to finding ways to avoid flood damage.

The 1936 Federal Flood Control Act began a response that put primary emphasis on changing the flow of water. Dams, channel improvements, and levees have been installed to give partial protection to most of the cities in the nation. Some argue that the result is to encourage more and unreasonable occupancy of the protected floodplains although there is little hard evidence on the relationship between occupant's risk perception and control devices. But every structural measure has its limits. Millions in damages from floods that are below those limits have been avoided. The protection may be taken for granted and those limits underestimated by developers and local officials alike. Nonetheless, short of redevelopment and relocation, there is little else to be done for many of our existing urban areas. Pittsburgh, and most of the urban areas along the Columbia and Missouri rivers, would have had major damages in 1972 but for the extensive protection works they enjoy.

The major long-run solution must be to locate, and relocate, our activities so that they are sensitive to the risk of floods. Some activities are more prone to damage from high water than others. Parks and open space are needed by every urban area; floodways can provide such amenities. Buildings can be built to minimize water damage, often within the range of existing good construction and design practice. But these adjustments to flood risk apparently won't happen without quite different local knowledge of risks, financial incentives, and regulations than we have had. Several recent changes in the politics of water development and resulting program changes give some promise that a new "ball game" is in the making.

What is clear is that no single approach to the problem will "work." Technically, no single approach does it all. Economically, we cannot afford to put enough resources into any one solution. And politically we can't expect to develop enough support for any one program. Perhaps the biggest problem to be faced is the political problem of risk awareness. Right after a major flood many are aware, but the push is to recover, to get back to normal. As the memories fade, the public will to act fades. The course of action left is to seek to build sensitivity to flood risk into as many of our public actions as possible. For this to happen, private and public advocates of flood prevention are needed at every level of decision making.

The New Politics of Water Resources

Water development projects have traditionally been fueled with the energy of local support (Ingram, 1972). Even though national agencies -- the Corps of Engineers, the Bureau of Reclamation, and the Soil Conservation Service -- are the major purveyors of such projects, an examination of their structure of decision making shows that they depend heavily upon local inputs. Local leaders provide much of the information required to define the project and the agencies certainly depend upon them to obtain the several essential congressional approvals required. In the past, one congressman would be reluctant to get involved in the project of another. Most participants worked hard to move each project along, as all had a positive stake in the process. With many more projects in the pipeline than could be built -- the backlog of authorized projects is well over a decade's investment -- strength of support and lack of local conflict were essential to a priority status.

This has changed with profound effects for flood risk management. Environmental groups in particular are often legitimate participants in the decision-making process. An environmental issue calls forth a constituency that cuts across project areas and congressional districts. The threat of escalation to a national issue hangs over the simplest traditional project. And environmentalists are unlike more traditional interests who have participated in the past. The water agencies have had little to offer that they want.

At the same time, local leaders and congressmen have a much wider range of federal programs in which they can participate to do good things for their community. Also, more and more state and local agencies are developing the capacity to bring technical expertise to bear on water problems. The water agencies have less of a monopoly in judging the alternatives.

The easy water development choices have been made. As in many of our natural resources, further development along traditional, limited-purpose lines can only take place by affecting other interests. Third-party or externality effects are increasing. If someone's current use of the resource is not adversely affected, there is now the clearer perception of the prospect of some future option being affected. Many more are affected by resource development decisions. Many more want access to these decisions. The result is increasing levels of conflict surrounding traditional water development projects and lower rewards for many of the participants in the decision process. Congressional interest has fallen off. Budgets have either been static or at least have not expanded as fast as have the problems needing solutions.

The prescription for this state of affairs has three parts (Allee and Ingram, 1972) -- all of which seem to be coming about. First, a broader bargaining arena would allow more interests to be accommodated. Flood control must be a part of a process that looks at many other concerns -- more than those that can be satisfied by multiple-purpose dams. Second, potential conflicts must be identified earlier. Environmental problems, if they are to be accommodated successfully, must be surfaced even before the impact statement is written. Third, if the agency program mix is expanded,

it will be easier to find combinations of actions which will attract the necessary support.

A Realistic Federal Approach to Floodplain Management Projects

In section 73 of the Water Resources Development Act of 1974, signed by the President in March, the Congress has signalled that it is willing to seriously consider putting federal funds into non-traditional approaches to flood-risk management. It strengthened this signal by authorizing two projects that had not been recommended by the Office of Management and Budget. Essentially, any means to reduce flood risk that can pass the benefit-to-cost test is now eligible for at least 80 percent funding.

The two unconventional projects authorized are worth thinking about. They represent just the sort of long-run solutions that local governments have been unable to implement without outside incentives. Such approaches have been advocated for years but only rarely accomplished, and then only with unusual leadership. It is perhaps time to make them the more usual approach.

The Charles River (Massachusetts) Project is simple enough in principle: prevent the loss of the natural flood storage in the 15,000 acres of wetlands upstream from the flood areas. Filling, draining, and building on these wetlands not only reduces the capacity to hold back water, it actually increases the amount and speed of the runoff. But how can we keep such development from taking place? Exhortation to local governments to use their land-use control powers to protect downstream communities doesn't hold much promise. Buying development easements, or simply the whole title, is a surer approach. Some $8 million is now authorized by the State of Massachusetts.

In 1970 I wrote the following about the second project authorized:

> "Prairie du Chien (Wisconsin) is one of several demonstration projects being developed by the U.S. Army Corps of Engineers that does not involve reliance on conventional structural approaches. In this case, it was clear that no structural measures could be justified to protect the some 1,000 Prairie du Chien residents who live on a low-lying island and adjacent mainland areas flooded regularly by the Mississippi River. This project has the potential of developing new federal re-location policies.
>
> "Interestingly, most of the people involved are either enthusiastic supporters of the concept, or at least accept it. The congressmen, the local officials, and many others responded in this way as a result of a carefully developed participation program. Careful step-by-step exploration of the problems of implementation and liberal doses of imagination and hoped-for funding seem to have produced a successful nonstructural project. If the Congress approves, the city will develop a relocation area on higher ground with assistance from the project. Further, the project will spend up to $1.1 million to move some houses onto new foundations and to buy others for razing. Owners of the houses that will be taken down will be reimbursed to obtain equivalent new homes.

"Prairie du Chien's floodplain will become a recreational area with a historic site and two marinas remaining on it. No flood control works should stem from this community. Appropriate controls to zone the floodplain against further development are now required and have been since 1 January 1968 when a Wisconsin law was passed to that effect. Indeed, if a local community does not now zone a floodplain, the Wisconsin Natural Resources Department is empowered to write such an ordinance.

"This type of approach with its solid program development characteristics and adequate attention to implementing details and compensation is what is needed. But for this to be a real alternative we have to be as equally willing to spend money to achieve it as we are to build dams and channel works. Once we have established that, then the existing rules to require a nonstructural plan and the demonstration that structures recommended are superior to feasible nonstructural approaches will take on some meaning."

It is encouraging to note that at this time the flood problems of the Binghamton (New York) area are being reviewed with these approaches in mind. Had Tropical Storm Agnes dumped its 15 inches of rain upstream from Binghamton, only a few miles from Elmira and Corning, the damage from Agnes in New York would have been much greater. The number of urban blocks inundated would have been 600 rather than about 200. The prospect of relocating the activities on that many urban blocks is a bit staggering, but the hope at least is that the practical limits of relocation will be seriously explored.

A New Prospect for Small Watersheds

Section 73 of the Water Resources Development Act of 1974 should not be limited to the large project and large problem setting. Small watershed projects usually carried out under PL 566 by the Soil Conservation Service also have the potential of using this authority. Perhaps the congressional strictures to emphasize farm flood problems in this program can now be eased and some of the untapped potential of the small watershed approach can be realized. In New York, the County Small Watershed Protection Districts and the technical and organizational assistance available from S.C.S. and the County Soil and Water Conservation Districts could be used to deal with many vexing small flood situations. These problems are certainly not confined to small rural communities. Broome County, for example, even under the more limited authorities, has found this to be an effective tool in the Binghamton region.

But the small watershed offers another possible flood-mitigating opportunity. The problem is in having adequate warning that a flood is coming. On many major rivers the Federal Weather Service is able to provide many hours of warning. But where the physical situation is such that six hours or less is the best you can expect, the federal system offers only limited help. A local self-help program using local observations and interpretation is not difficult to design. The few successful efforts -- Olean, N. Y., for example -- indicate the value of such a system. The problem is getting such a system organized and sustained over the years. Watershed organizations are called for, but they need technical assistance and other support that could come from state or federal agencies or perhaps

basin organizations like the Susquehanna River Basin Commission which is in fact developing such an effort.

Flood Insurance -- The Community Sensitizer

Recent changes in the federal flood insurance program and complementary state legislation should make many more aware of the risks they face as well as encouraging more effective floodplain regulations. Existing development can be covered through private companies by subsidized insurance. Once the detailed data are available for setting the rates, all new building must be covered by insurance at full actuarial rates. Before the detailed data are made available by the Federal Insurance Administration, the community must adopt a permit procedure for the designated high-risk areas, and then the subsidized insurance is made available. Insurance will be required for any mortgage issued on improvements in the high-hazard areas by federally regulated or insured financial institutions. Also federal aid, including flood relief payments, in these hazard areas will be limited unless the community qualifies for the program. Qualification requires the adoption of regulations that specify how construction will be made sensitive to the flood risk shown by the detailed data.

The sanctions on individual mortgages and on federal aid to communities, as well as expanded coverage, were added to the program in late 1973 in response to the 1972 flood costs. Available for some years, the voluntary approach had attracted only a few communities and very few property owners. While they promise to make the program more effective in discouraging risky use of the floodplain, they will also put the program under very substantial pressure. In particular, the mortgage provisions may raise considerable uncertainty in the land market that will not be dispelled at least until the program is well understood, and perhaps not until the final detailed data are made available. It may take as long as a decade for the data to be generated. Communities, like land owners, have been reluctant to label their real estate with the levels of risk calculated by the hydrologists. Also, many communities have had major conflicts over the adoption of the kinds of controls called for.

The existence of floodplain information and controls should stimulate interest in other approaches to flood risk management. Dams and channel work should be easier to translate into perceived benefits. Relocation and flood-proofing should make more sense to more people.

The Need For a Complementary State Program

Higher levels of government influence local actions by grants-in-aid, direct services, and mandates. Mandating actions for local governments is constitutionally a state prerogative which obviously may be influenced in turn by various federal inducements. In the case of the flood insurance program it might appear that a formidable set of inducements had been organized to produce effective local floodplain management. However, there is a basis for expecting less than overwhelming results, and an understanding of why and how a shortfall between results and expectations may come about should suggest how supplementation should be designed.

In some communities the flood insurance program, with its subsidized insurance for existing property and its sanctions through community grants

and individual loans, supports a significant existing local interest in land-use controls. Proponents of such techniques are reinforced by the requirements and can take advantage of the expertise offered, undercutting opposition by pointing out that the community now has no choice, at least for the floodplain. But what about the communities in which no sympathetic local group is significant in local affairs? As others have observed, there is reason enough to expect effective filibustering and bargaining if not outright noncompliance (Holden, 1966; Derthick, 1970; Ingram, et al., 1974; Hahn, 1974).

Even with the best of intent most small, usually rural communities have little expertise to put into a floodplain management effort. Others will not share the objectives of the program and have the capacity to frustrate the intent. This the program proposes to correct by providing all with the data and analysis needed. Rather than a grant to fund the work, the Department of Housing and Urban Development, of which the Federal Insurance Administration is a part, will contract to have it done. In the Susquehanna this is being done through the Basin Commission, relieving HUD's strained contract supervision resources. But what about the matching up of ordinance with data, in the initial drafting of the regulations, their amendment, and their enforcement? It remains to be seen how much the Congress will provide for follow-up; the agency resources are not in place at this time. Furthermore, HUD, like any agency dealing with local governments, must seek to maintain good working relations, particularly with the more urban jurisdictions that are most likely to have the capacity needed to negotiate.

Much seems to depend upon the response of the bankers and other federally regulated loan agents. They must determine if a property is within a flood hazard zone and require it to be insured. This should be workable but puts the pressure on the definition of that zone. Often there is considerable technical latitude in what constitutes a one-hundred-year frequency flood zone. There is the problem of evaluating future improvements in channels, effects of dams, and the like. But perhaps the greatest threat comes from the use of variances and permit exceptions by local governments where a series of developments, allowed to encroach on the floodplain, could cumulatively change the size of the hazard zone.

The denial of federal grant aid to the non-conforming community presents a most sensitive problem. These will be grants that both the local people and the granting agencies want consummated. At the very least, long hours of negotiation can be forecast. The likely intervention of the congressional delegation will at least involve some awkward confrontations and may pose the threat of legislative modification of the program. And HUD needs to show success in its handling of the assigned responsibility. Substantial pressures exist to find ways to accommodate the recalcitrant communities at some cost to the rigor of the execution of the program. What constitutes an acceptable control ordinance? Must a residence always have its first floor above the 100-year flood elevation? What is acceptable flood-proofing for the other uses that may be placed below this level? The scope for bargaining is there.

Compared to most regulatory programs this one would seem to have some features that should make it more successful. Existing property owners may not find the degree of subsidy (up to 90 percent) in the insurance

attractive. They certainly didn't flock to their insurance agents in the few communities that became eligible under the sanctionless program. But it may be viewed by other participants in the decision-making process as a significant compensation for the burdens of the program. The water quality grants and enforcement programs would seem to reinforce each other in this way, although the failure to fund the grant side is probably hurting the support for the enforcement side. Also, the popular acceptance of avoiding high flood risk locations would seem to be high -- that is limited by the extent to which high risk is perceived as something less than the hydrologists' 100-year zone.

New York's Response to Floodplain Regulation

Wisconsin has had a mandated floodplain regulation program since 1966. A few other states had followed suit prior to the late 1973 amendments to federal flood insurance programs that raised the coverage and added the sanctions. New York had a governor's bill in its legislature in early 1973 that used the Wisconsin program as a model, adding to it features which students of the Wisconsin experience had found desirable (Yaangen, 1972). It essentially provided for a local zoning of the floodplain subject to state guidelines, technical assistance, and local enforcement, with the threat of state assumption of either responsibility if not performed adequately. Reaction in the State Assembly was to seek a county intervening role between local and State actors to further protect the home-rule principle. Interestingly, when the federal amendments became known, this was dropped in favor of limiting state intervention to only those communities to be designated by HUD as having flood hazards, and limiting the state to only constraints on floodplain use sufficient to qualify for the federal insurance.

New York has some 1550 local jurisdictions. Of these 960 are towns, and the remainder are divided between villages and cities. Over 1000 are expected to be designated by HUD as containing one or more flood hazard areas. How many of these will accept the State's offer to draw up the ordinances and/or enforce them once adopted? While some will find the threat of State intervention and offer of technical assistance a sufficient reinforcement to local interest for land-use regulation, there will be those small, rural jurisdictions that will be quite happy to let the State take the heat from their constituents. And some communities which lack building permits and building inspectors now will find it much easier to let the State provide this service than to do it themselves or join with their neighbors or let the county do it.

Technical assistance from the state, however, should facilitate intermunicipal coordination and cooperation. It should provide expertise which can be used to bargain with HUD. Professional values in implementation, uniformity between jurisdictions, linkages to other flood risk and water management alternatives and plans should be enhanced. If adequate resources are forthcoming, it should be possible to monitor the cumulative effects of exceptions and variances, and at least give the local land-use regulators access to the knowledge of such effects, if not reinforcement in its application. It would seem that the likelihood of two agencies (HUD and the state) finding enough resources between them to do the needed follow-up would be greater than if only one of them were involved.

However, it should be noted that the greatest advantage in state involvement may be in the constitutional question of who has the authority to mandate a local government action. It should be clear under the New York statute that local compliance is indeed mandated. This is an addition to the incentive of the federal sanctions.

Similarly, the use of the police power to achieve floodplain regulation should be enhanced at least insofar as any challenges based on the taking issue are usually not as important to the use of the police power as is the attitude of the enforcing officials; nonetheless, it is not without significance. Now the state is more likely to be a party to the action. Also, it is clearer to the courts that this is a socially sanctioned use of the police power; cause and effect should be more clearly identified, at least to the extent of the subsidy for insurance on existing buildings some compensation is provided, and although the cost is affected, there is no particular prohibition on uses of land similar to those on surrounding parcels. While these are points that have sustained land-use controls in the past and exist technically under the federal program alone, they should be strengthened in the courts' eyes by being reinforced by a state legislative act.

Flood Risk Management as an Example of Step-by-Step Policy Development

Public policy changes come in a series of incremental steps, rarely in large sweeping reforms (Lindblom, 1958). It is easier to get agreement for proposals for limited changes where the remedy is well defined and clearly linked to a particular problem. A national land-use policy act or a comprehensive state land-use control program is much more difficult. Uncertainty about who will be affected, and how, is enough to cut the chances for support. Agricultural districts, or protection for tidal wetlands, or a stream protection act, or a floodplain management bill, offer approaches that attract support. Several problems are posed by this process that should be recognized particularly by community and environmental leaders.

First, this is a remedial process of diagnosis and prescription. Changes in programs are made, and their effect should be assessed -- not only on the direct objective but on side effects as well. The response to the changes will first come from those who have a direct, immediate and tangible stake. Those who are affected less directly, in smaller ways, and less tangibly, will react more slowly if at all. And in today's fast-moving world, the "turn around time" for revising program changes is much shorter. This increases the burden on those who would represent the broader, more diffused interests.

Second, it is increasingly difficult to see how these many programs fit together, where they complement each other, and where they counteract each other. It may be harder to do this at the higher levels of government than at the lower; the system is so complex and responsibilities so specialized. Yet the local community seems to have so many constraints placed upon it from outside. Again a special challenge is put to our community and environmental leadership to know their local situation and to take responsibility for getting it reflected and understood at higher levels of decision making.

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MASSACHUSETTS WETLAND PROTECTION LEGISLATION

John H. Foster

The Massachusetts wetland protection legislation takes two forms. Under one, the Commissioner of Natural Resources initiates action, while in the second, the person or agency hoping to alter the wetland initiates the procedure.

Under legislation enabling the Commissioner to initiate action (Chapter 130, Section 105 of 1965 for coastal wetlands and Chapter 131, Section 40A of 1972 for inland wetlands), orders may be issued, with the approval of the State Board of Natural Resources, to regulate or prohibit dredging, filling, removing, or otherwise altering or polluting wetlands. Wetlands are defined by the use of such words as marsh, meadow, and swamp, and the laws clearly include flood-prone areas within the definition of wetlands. The public purposes to be served by the orders are the preservation and promotion of the public safety, private property, wildlife, fisheries, water resources, floodplain areas, and agriculture.

The process of issuing orders first involves a decision about land to be included and a precise determination of the owners of the land and their boundary lines. A public hearing is then held with notices to all land owners and to a long list of local and State government agencies. Orders are then drawn up, approved by local government selectmen or the city council, and issued by recording them along with a list of assessed owners in the Registry of Deeds. An affected owner can ask an appropriate court to judge if the order constitutes a taking without compensation. If the court decides in favor of the landowner, the Commissioner may take the specific parcel of land in fee or lesser interest by eminent domain.

Excluded from limitations imposed by any orders is the improvement of land or water for agricultural purposes, although subsequent non-agricultural use of land so improved is subject to any orders. This exclusion is particularly important to cranberry growers in the State. Also excluded are the activities of numerous State agencies such as the Department of Public Works.

To date, approximately 26,000 acres of coastal wetlands and 46,000 acres of inland wetlands (mostly floodway land) are under orders issued under these two laws. Since a court test of these two laws has yet to be initiated, it is reasonable to assume that the orders which have been issued are not limiting landowners in any serious way. This assumption is reinforced by the necessity of local government approval of the orders.

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Since there are about 327,000 acres of freshwater wetlands in the State (not including normally dry floodway land) and 52,000 acres of coastal wetlands, many people with a concern for the protection of wetlands feel that work under this legislation is proceeding more slowly than is desirable. Part of the reason for this is the requirement that all landowners and their boundaries be determined, an expensive and time-consuming requirement. The ownership situation of many wetlands, especially the larger ones, is particularly obscure since they have had little value and deed writers have, over the years, paid little attention to boundaries within wetlands. It has been suggested that this job, at least its first steps, be accomplished by local, volunteer man and woman power, but the Department has not yet accepted this suggestion.

My own opinion concerning this legislation is that it gives the public a powerful tool for the protection of both wetlands and floodways in the public interest, although the definition of the public interest excludes some wetland benefits, such as their educational and scientific values and their open space and visual characteristics. Its implementation, so far, has not realized the protective potential of the tool. This is partly because of the cost involved and partly because the Department has taken a cautious stance on the legislation. The legislation does represent a substantial new invasion of the concept of private property in land and, until it learns how to implement the law, the Department apparently has decided to move slowly and only on land where orders do not involve much of a hardship on landowners.

The second form of wetland legislation (Chapter 131 Section 40 of 1974)[1] is much more widely known and understood. This is because anyone wishing to remove, fill, dredge, or alter a wetland anywhere in the State must file a notice of intent to do so and receive an order of conditions before starting the work. This law now covers both freshwater and coastal wetlands.

The lands subject to this law include all banks, beaches, dunes, and wetland bordering on open or flowing water and land subject to tidal action, coastal storm flowage, and flooding. Such wetland terms as marsh, bog, and swamp are defined primarily by reference to vegetative species, although reference is also made to seasonal water levels.

The public benefits from wetlands which are to be protected by the legislation are public and private water supply, ground water, flood control, storm damage prevention, the prevention of pollution, the protection of land containing shellfish, and the protection of fisheries. The law is somewhat vague in that it says that a determination must be made on whether the proposed site of the work is "significant" to these listed interests.

Under the law, any person or government agency wishing to alter land subject to the legislation must file a Notice of Intent describing what he wants to do and its location. He must include a $25 filing fee. The

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[1] This new legislation amended previous similar legislation dating originally from the late 1960's which had already been amended several times. The discussion of experience is based on the former law.

primary recipient of the notice is the town or city conservation commission, but a copy must also be sent to the State Departments of Natural Resources and Public Works. The Conservation Commission then holds a public hearing and issues an order of conditions which legally govern the alteration work. Although there is no authority to deny permission to make the alteration, there is no limit to the conditions which can be imposed, at least within this law.

If the applicant, abutters, or any 10 citizens object to the orders, or if the Conservation Commission fails to act within the stated time limits, an appeal to the State Commissioner can be made. He then reviews the application and issues orders of condition which supercede any orders by the local conservation commission. The Commissioner may also take the initiative to become involved in the case, usually because he objects to the orders issued by the local commission. The local commission is also required to give a quick opinion, if specifically requested, concerning the applicability of the law to the proposed activity, but the Commissioner can also intervene here.

The exclusions in this law are quite limited. They include mosquito control, maintenance of flooding and drainage systems for cranberry bogs, normal maintenance and improvement of land for agricultural use, and emergency programs ordered by State or local governments.

Actions under this law number more than 3000 per year. About 10 percent involve an appeal to the Commissioner, and the Commissioner initiates his own involvement in about 3 percent of the applications. Although a few cases have been through lower courts under this law, as far as I can determine, none has reached a higher court. This may again say something about the conditions being imposed on landowners.

In a sense, this legislation may be considered a temporary method of protection to be effective until the protection under Sections 105 and 40A discussed above can be implemented. As such, there is substantial involvement by a large number of people, since the basic responsibility rests with local conservation commissions. A substantial amount of general citizen interest is generated by the required hearings, and the objectives of the law seem to be broadly accepted. The potential and actual limitations on landowners likewise seem to be broadly accepted by both the affected landowners and the general public. In a recent survey of wetland owners, only seven percent expressed strong objection to the law, while 22 percent were ignorant of it. A total of 60 percent expressed clearly positive feelings about the law[2].

One of the recent changes in the legislation shifted the primary responsibility for the law from the State to the local government level. This has generally been regarded as a desirable change. It not only strengthens the concept of home rule, which is strongly supported in the State, but also

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[2] T. Gupta and J. Foster, Institutional Framework Affecting the Use of Inland Wetlands in Massachusetts, Cooperative Extension Service Publication No. 91 (Amherst: University of Massachusetts, July 1973), p. 17.

gives conservation commissions more of a sense of usefulness and puts the responsibility at the local level where the impact of any alteration will be felt. The change has made clear, however, that there are no qualifications required for local commissioners except their appointment.

Although the law clearly includes normally dry flood-prone land, the emphasis in use of the law so far has been on wetland protection. My guess is that few people, either landowners or local commissioners, realize that flood-prone dry land is covered by the legislation. The complete lack of a definition of flood-prone land in the law may be partially responsible for this.

My overall evaluation of this law is that its implementation is achieving a significant amount of protection of the public interest in wetlands. Although the conditions imposed on landowners, to date, may not have generated significant court cases, they have modified, and in some cases stopped, undesirable alteration of wetlands in the State. The interests to be protected are somewhat limited in that wildlife and cultural benefits are omitted, but many public concerns are required to be considered. The use of the word "significant" without further definition in describing the determination of the benefits of the wetland site leaves a large measure of ambiguity, but experience with the law will gradually narrow this ambiguity. The law is accomplishing a reasonable measure of its public purposes, but a tougher stance and a broader definition of benefits would probably be desirable, if it is to protect the total public interest in wetlands.

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WORKSHOP SESSION 5

Experiences with Tax and Special Incentive Policies as Land-Use Control Techniques

ASSESSMENT POLICIES AND PRACTICES

Dale K. Colyer

Attitudes, policies, and practices of assessment officials have a profound effect on the assessed value and consequent tax that a land or other property owner must pay. This is a basic concern for everyone interested in agricultural and other open-space land uses where the maintainence of a sufficiently low tax cost is essential if the owner is not to be forced to dispose of the land or convert it to more intensive uses. In those fringe areas where development is eventually probable, land prices tend to rise but not to the very high levels attained when development actually takes place. Nonetheless, the decision as to when the land should be valued and assessed for intensive-purpose uses is a matter, largely, of judgement where, in most tax jurisdictions, the assessor has a considerable degree of latitude in determining assessed values. Thus, the approach of public officials and others in a particular taxing jurisdiction will be important in determining when and if a much higher tax bill is sent for, say, farmland in an area under developmental pressure.

The primary reason that this topic is included in this land-use conference is the concern expressed by Professor Conklin and others that there appear to be some significant changes in attitudes toward land values. These changes are reflected in policies and practices which result in a more rapid adoption of higher assessed values for farm real estate. For example, in the past it was a common procedure, at least with many assessors, to reassess a tract of land at the higher development value when the landowner had sold two or three lots from that property, but it now appears more common to reassess all the land in an area when any development has occurred. This may be done regardless of how remote or imminent the conversion of any other tract may be.

The change described in the preceeding paragraph is, however, only an example, and there are many attitudes toward assessment at all the various levels concerned. These include the individual taxpayer, local assessor, other elected officials at the local level, state-level tax administrators or supervisors, legislators, and others concerned with property taxes and their administration. Many people within the groups concerned with these issues will have attitudes very different from those of others. The purpose of this paper is not to catalogue all the various attitudes, policies, and practices, although some of that is unavoidable, but rather to determine and analyze some of the underlying forces that may be inducing significant shifts in the assessment process, shifts that may have what are felt to be

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undesirable consequences from the standpoint of maintaining open-space uses for land in urbanizing areas. The evolution of the process is especially important in the northeastern region of the United States, where urbanization affects nearly every square foot of land, either directly or indirectly.

Some Historical Aspects

The existing assessment attitudes, policies, and practices have their roots in procedures and philosophies developed in the last century - although in most jurisdictions they have undergone substantial modification. The basic concept that was developed in the first half of the nineteenth century was that all property should be taxed at a uniform rate on an ad valorem or market value basis (15, 16).* Previously most taxes were based on a per capita, head, or unit basis. The new system was thought to more nearly be a system based upon ability to pay, that is, the value of the property owned was expected to be a reflection of the income a person received. The procedure was implemented, typically, by elected local assessors at the township, village, or other sub-county level. In small communities public knowledge tended to insure fair assessments. Most state governments, as well as local units, levied taxes on property, and many participated in the process.

The current situation, which might best be described as a hodgepodge, evolved from that all-encompassing philosophy (2, 8, 10, 12, 15, 16, 20, 24). In most states, or substate regions where some local options are allowed, some properties or taxpayers have been exempted from taxation or alternatively are taxed at different rates. By deliberately specifying that some properties will be assessed at one percentage of the market value, while other types are assessed at other percentages, a de facto rate differentiation is imposed in many other jurisdictions. Some property (government or church) was exempted from the start of the system but have been joined by a growing list (29). The list of complete or partial property exclusions includes intangibles, household goods, livestock, farm machinery and equipment, personal property, industrial property, mortgaged property, antiques, works of art, jewelry, furs, standing timber, and business inventories. Persons who have been who have been wholly or partially exempted or received rebates or tax credits include the elderly, the poor, the homeowner, veterans and their widows, dependents, and parents (gold star), disabled veterans, military personnel, blind persons, orphans, and "professors at Brown University". Use value assessments and exemptions for new industries are only a couple of the myriad of special provisions that legislators have passed for special interest groups.

The backing away from the all-inclusive concept or universal property tax was, for some forms of property such as intangibles, a result of the cost or difficulty in collection of the taxes, but more frequently the changes have reflected a desire to benefit some particular group because, perhaps, it was felt that the tax burden was an unfair imposition on them relative to the benefits received from the public sector, as in the case

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* Numbers in parenthesis refer to reference material listed at the end of this paper.

of the elderly, who do not directly benefit from current school expenditures. In the case of use value assessment many legislators apparently feel that the economic consequences of high tax costs on farmers due to market value assessments are undesirable. Most of these tax measures are subsidies which the public and many legislators might find deplorable and would be viewed as welfare statism if made as direct payments.

Regardless of the reason for the erosion of the property tax base, an effect has been to reduce net tax collections and to force up the rates or assessments for the remaining tax payers unless some other form of tax was substituted or unless some public services were eliminated or curtailed. Some states have made payments to the local governmental units to make up for the lost revenue, but others have required or permitted the changes to take place without providing alternative revenues.

Despite the changes described above, one of the most obvious characteristics of the property tax system has been its relative inflexibility. Changes that are adopted spread only slowly from state to state, although there have been several surges in legislative activity, including some in recent years. Thus, many states have given some form of property tax relief to the elderly, while somewhat less but still significant numbers have adopted various forms of preferential treatment of agricultural lands. A study by the Subcommittee on Intergovernmental Relations of the U. S. Senate indicated that by early '73 at least 44 states had some form of program for the elderly, generally based on income limits ranging from as low as $2,400 to as high as $8,000, but typically around $5,000 (29). According to Hady and Sibold some 31 states had some form of preferential treatment for farm lands (9). Senator Muskie, however, concluded that "... the states have not met their responsibilities for making property tax assessments fair, expert, and easily understood. I find these results most disappointing" (29, p. v).

Existing Assessment Practices

The trends and forces that affect assessors tend to cause actual effects which are implemented through assessed values and then translated into tax bills. Everyone is familiar with the litany of the taxpayer who has been faced with increasing taxes due to higher assessments, higher tax rates, or more commonly both. In some areas the tax bill for an ordinary three-bedroom home reaches into the thousands of dollars category and goes up nearly every year. Taxes on an acre of farmland may exceed all other costs in areas where the land is assessed at its developmental value. In addition, problems related to equitability in the treatment of taxpayers have been of concern to the public, legislators, and many assessors or other local government officials. That these have important impacts can be adduced from the frequent and vitriolic public debates and complaints about the property tax. This disenchantment has progressed to the stage where congressional committees have held hearings, and federal legislation has been proposed to induce reforms in the system, which heretofore has been a concern strictly of local and state governments.

An examination of some of the existing assessment practices can be used to help understand the background of the complaints and dissatisfactions with the system. For this the results of several studies of real estate assessment in West Virginia, plus some other independent studies and those reported

by the Senate Subcommittee, will be used to indicate some common assessment practices as reflected in actual situations (1, 3, 4, 7, 14). A report of the Senate Subcommittee on Inter-governmental Relations released in 1973 showed that state and local governments receive from about 13 to 70 percent of their tax revenues from all kinds of property taxes (29). The average appears to be about one-third of the total, most of which is the tax revenue for local governments and schools, which often receive up to 95 percent of their revenue from property taxes. In at least 38 states all or part of the local assessors were elected officials, with no professional qualifications needed.

Examination of existing assessment practices nearly always shows a great diversity, not only between the various taxing jurisdictions, but also within most tax districts. The variations from one property to another within a tax district are probably the most usual cause of complaints about lack of equity, since most taxes are locally imposed, and a different practice somewhere else does not directly affect a tax payer. The studies in West Virginia have shown a vast amount of variation both within and between counties, which are the tax assessing units within the state, but also have revealed some common practices which have practical and important implications for equity. Many of the practices are not limited to West Virginia, as shown by findings in other states. While West Virginia is not typical of urbanizing areas, a considerable number of counties do have such pressures either from within or because of the growth of nearby urban areas, such as the District of Columbia. Furthermore, while there are unique attributes of the State's tax system, it has many features in common with those of other states of the region.

The technique used in the West Virginia study of assessment practices, one that frequently is used, was an assessment-sales-value-ratio analysis. For these studies the assessed value is divided by the sales price of a property that has been transferred. Since most states require that assessments be based on true and actual value, i.e., the market value, ratios and comparisons of the ratios between different properties can give indications of how well the assessments reflect true values and how equitably these are distributed between properties. Because of imperfections in the land market, and because many transfers are made for nonmarket reasons for which the sale price does not reflect the true value, care must always be used in interpreting the results of such studies. If a large enough sample of properties is included in the study, useful conclusions are obtainable. In most states or other taxing jurisdictions a fractional system is used when the assessments are to be some percentage which generally is specified by legislation but which may be only a common practice.

The major findings from the West Virginia studies include the existence of wide variability from county to county and within each of the 55 counties. Similar findings have been reported for Oklahoma (22), Montana (28), and Indiana (27). The assessment ratios also appeared to have been affected by such factors as value of the property, acreage transferred, type of property, use of the land, existence of improvements, and location. While very few of the relationships were true for all 55 counties, there was enough consistency to be able to detect some patterns.

A finding observed in nearly all cases and for several different years is the tendency for the ratios to fall as the values increase of the prop-

erty transferred. Thus, the more valuable properties are assessed at a smaller proportion of their values than lower priced real estate. Similar results were observed for New York in 1936 (23), recently in Gary, Indiana (27), Montana (28), and Maryland (11, 17). In West Virginia it appears that the practice may not be as pronounced in some of the more populous counties in which assessors are somewhat more aggressive and a little more insulated from the voter because of the larger population and thus more impersonal nature of the office. Various reasons can be hypothesized as causes of this phenomenon, including that it is unfair to fully tax the higher valued property because the owner does not receive more benefits than others who pay less and that the more affluent are apt to appeal to the review board or to persuade the assessor to lower the value for personal, political, or other reasons (i.e., they have more influence). To some extent the results could be spurious because the land sold at low prices might not have the true market value as the sales price, although the trend seems to hold in nearly all price categories used, up to relatively high price levels, where there appears to be a leveling off from the downward trend.

Another common practice in the State is the assessment of larger acreages at lower ratios than smaller acreages and properties classified as lots. Along this same line all rural properties typically were assessed at ratios lower than urban or suburban properties in most counties. Since the larger acreages would tend to be farms, it appears that agricultural land is being given a break in addition to paying a lower rate than other commercial properties. Lower assessments also have been noted for rural land or larger parcels in Alabama (26), Montana (27), and Oklahoma (22).

The lowest average ratios found for any type of property, however, were for unimproved lots, i.e., those properties which were platted but on which no buildings had been erected. This generally prevailed whether the lots were within towns and cities or in rural areas. Such a practice would seem to benefit only the developer and land speculator. Improved properties, and particularly residential property, tended to have the higher ratios, although in some counties commercial property was assessed relatively higher than residences. It might be noted that vacant lots pay twice the tax rate as either farmland or owner-occupied residences and that assessors may feel that this is unfair although in many counties such lots were assessed at less than half the rates typical for improved lots. The unimproved tracts also typically were assessed at lower ratios than improved tracts for a series of studies in land transfers in Maryland (18) and Montana (28), but the opposite was found in a study for Gary, Indiana (27).

In West Virginia the State has the power to reappraise real estate for tax purposes and did so in a state-wide program between 1958 and 1967, but the Tax Commissioner's Office lacks sufficient resources to do so on any except a piecemeal basis (5, 6, 14). Thus the level of control is strictly at the county level. Counties with larger population bases tend to assess properties at higher percentages of their sales prices, which can be attributed to the need for greater revenue, to the existence of more resources for the assessor, and to some extent to a greater isolation of the assessor from the individual taxpayer, which size tends to produce. However, many of the practices that are common for the State also prevail in these larger counties. Thus, even in these counties large acreages (farms?) tend to be assessed low relative to their sales values vis-a-vis other property, a

situation that may be an unofficial use value assessment. The wealthy also appear to be given a break similar to that of the smaller counties, but the trend is less pronounced in many of the larger counties.

Another factor more prevalent in the larger counties, but not exclusive to them, is the tendency to reassess all properties that are sold (but not similar properties which are not sold). A majority of the assessors in the State routinely reassess only when there has been parcelization or the addition or deletion of improvements. It might be noted that with increasing property values more inequities are apt to be caused by this routine reassessment of only transferred properties than where that is not the practice.

West Virginia probably can be characterized as a conservative state with respect to assessment practices. All assessors are elected for four-year terms, and there are no professional requirements for the office, but there is only one assessor per county. The State does assess utilities and railroads, does provide some assistance to the counties with a few trained property assessors, and has an annual conference with training sessions for all assessors. Nine counties have computerized tax roles in cooperation with the Tax Commissioner's Office, but these cannot be used to carry out a computerized reassessment at present.

Forces Affecting the Assessment Process

Most of the practices described in the preceding sections are those of assessment processes which can be characterized as conservative with respect to the general attitudes that prevail. There are a number of other forces that are actively influencing property taxation attitudes and practices that appear to be of sufficient magnitude to eventually cause significant changes in most of the states and the subunits in which assessment takes place. The expectation should be that the types of recommendations made by the Advisory Commission of Intergovernmental Relations will become the norm in assessment policies and practices (27, 29). These recommendations center around centralization and professionalization of assessment activities, the provision of adequate resources to adequately perform the task, and a more significant role for the State in the process.

An important factor in this will be, and has been, the widespread discontent with the existing structure which has produced high rates and vast inequities. There are, however, other forces acting that will influence the rate and timing of implementation of the reforms or other types of changes that do take place in particular areas. The most pervasive force that has affected property taxation has been the increasing need of local governments and, especially, schools for increased revenues. Since a very large share of their revenue typically is received from property taxes, there has been a tendency to constantly increase assessments, tax rates, or both. The elimination of certain types of property from the tax base and the "breaks" given other taxpayers have resulted, in part, from the high burdens the taxes impose on many landowners and then have reinforced the tendency to raise the assessed value of remaining properties unless the states have made alternative provisions for finance of the schools and local governments. General revenue sharing, if continued, can have an

impact on this process by relieving some of the pressure on local government revenue sources.

Economic development and urbanization are other forces that have had and will continue to have impacts on assessment. These have resulted in land-use changes and rising land prices, not only for the properties directly affected, but because of a spread effect, for all land in surrounding areas. As indicated previously, individual assessors and others influential in the process have an important role in determining how these changing values get incorporated into the tax bills of individual landowners. As property values have increased it has been easier to increase the assessed values. The assessor is merely obeying the laws which call for the use of fair market values or a percentage of such values. This has been true whether the assessor is elected or appointed, and whether professionally trained or not. Several factors seem to influence the rate, positively, at which the assessed values are raised in response to the increased need for revenue.

The growth of the population and its increased urbanization have weakened the influence of rural areas. Thus the local governments, including assessors, tend to be less sympathetic to the farmers' problems and needs. There is less concern that the land will be forced out of agriculture. Many local officials, as well as developers, see such changes as positive benefits, since the use of the land is intensified--put into its "highest and best" use--and the tax base is expanded.

With urbanization and an increased tax base the resources available for the tax assessor are expanded, enabling the hiring of a larger, more competent staff which is better able to keep up with changes in values and update the assessed values more frequently. Thus, an expanded tax base is likely to speed the process by which open-space lands have their values converted to their developmental values for tax purposes. This can be viewed as a circular process in which an increase in the tax base increases the assessor's resources, which enables a more rapid reappraisal process, which increases the tax base, which continues, ad infinitum.

The appointment of assessors and the imposition of professional requirements for the position also can lead to a more stringent attitude toward changing the assessed value of open land. Appointment separates the assessor by at least one step from the voter and, thus, can lessen the political pressure on the office. The effect of public opinion will be felt to some extent through the appointing agency which most frequently will be some locally elected set of officials. The appointed assessor, however, will tend to be judged on his performance in office, and one of the measures of performance will be the level of assessments and the changes (increases) that take place in these as the need for revenue increases. Thus a more vigorous approach to the process is implicitly a part of the change to the use of a "hired hand" rather than a public, elected servant.

Professionalization of assessors implies training in valuation, improved knowledge of tax laws, and a greater awareness of changes occurring. And, although many elected assessors are fully competent to oversee assessments, the general level of administration is apt to be improved. This

increased capability would be expected to lead to getting and keeping assessment values up-to-date and, incidentally, to a more uniform and equitable treatment for similar properties. It also would be a factor in the more rapid conversion of assessed values to development levels as sales values of similar properties are used for the updating function, unless use value or some other restraint is imposed by the tax laws.

The movement toward centralization of control can also lead to more rapid adjustments in assessed values. Centralization means a move toward fewer assessment jurisdictions by elimination of some units; either those that overlap are combined, or smaller subunits are merged. The movement is toward a county basis in those states where county government is important, which is typical, except in New England where "towns" are the prevailing form of local government. Included in the process of centralization is a greater role for the state governments, either directly or as regulatory agencies. Hawaii has a completely state-conducted property tax system, but the norm is still for very little input from the state. The trend is toward growth of centralized activities in the form of regulations, supervision, assistance, or appraisal of some or all types of property, and other concerns such as development and administration of tests for professional qualifications. Greater state involvement is often a renewal of past activities when the states, as well as local units, depended on the property tax as a principal source of income.

A final factor affecting the assessment process is the computerization of the data for assessment and in some cases the actual use of a computer program to initially assign the assessed value for all properties (10, p. 125 ff.). By use of sales data on properties transferred since the last assessment, together with information on the characteristics of all parcels and a predictive model based on previous regression studies of values as related to the characteristics of the properties in a given taxing jurisdiction, realistic estimates of the true value can be easily and quickly computed for all the thousands of parcels that typify the typical county, city, or other taxing unit. Even a moderate-size staff would need months or weeks to do what the computer can do in a few hours or minutes. The typical computer-assisted assessment procedure uses sale values of recently sold, similar properties to determine the value of a particular parcel, and the system can be programmed to do so in an infinite number of ways. Thus, its use need not result in a more rapid conversion to assessments based on development values, since parcelization, immediate adjacency, and other factors could be built in as requirements before large changes in values are permitted. Significant departures from previous values could also be flagged to call for human inspection and investigation before being used.

Conclusions

Changes in attitudes toward assessment and taxing policies can have significant effects on the relative tax burdens for the owners of the various categories of land being taxed. The rapid, in tax change terms, adoption of the various types of tax relief for low income, elderly persons and the only somewhat less rapid spread of preferential treatment for agricultural land in recent years are two examples of attitudinal changes that have important impacts. To some extent, however, they are only a continuation of the chinking away by special interest groups at the concept of

a universal property tax, i.e., the taxation at a standard rate of all forms of property based on an ad valorem concept.

The property tax system is best described as a generally conservative and archaic system that has become the source of widespread complaints because of increasing burdens for the individual taxpayer and because of gross inequities in its administration. Assessors are frequently elected officials who are not required to have professional qualifications, tax districts are too small to have sufficient resources to do an adequate job; and other factors, personal and inherent in the system, cause unequal treatments of similar properties and preferential assessments where such treatment is not authorized or legal. A highly dynamic land market that has seen rising prices has compounded the difficulties.

Economic forces, especially in urban areas (but also in most rural regions) and expanding governmental services have been constantly forcing the need for revenues upward and consequently have caused increases in assessment levels, tax rates, and tax bills for the landowner. These rises have resulted in the search for tax relief which has been granted to the various groups who could successfully plead economic hardship or otherwise influence legislators to grant them special treatment. The burden consequently has increased for the remaining taxpayer unless the states or local governments turned to alternative sources of revenue.

Professionalization, centralization, and adequate financing of the assessment process are the basic directions in which the property tax reform is moving to produce greater equitability, although the pace of change is very slow. Relief of the tax burden to any significant extent does not result from reform of the system, although the burden becomes less inequitable if properly administered. Computerization can aid in the process of reforming tax administration but cannot by itself overcome the excessive dependence by local governments and schools on taxes imposed on highly visible real property such as residences. A more thorough reform of the tax system is required to accomplish that.

The undesirable economic and social consequences of high and/or inequitable property taxes are having effects on the public and their legislative representatives. There have been significant reforms of the property tax laws in several states, and a majority have made changes designed to modify the impacts of the tax. The forces currently interacting at local, state, and national levels undoubtedly will result in additional modifications in the taxing structure, and it appears that the property tax certainly will be relatively, and probably absolutely, a less important revenue source.

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USE-VALUE ASSESSMENT IN THE NORTHEAST

Irving F. Fellows

In 1963, Connecticut became one of the first states to enact a use-value assessment act for farm, forest, and open space land for property tax purposes. Since that date, over 30 states have taken similar steps, although there are important differences, both in basic concepts and procedures. Hady and Sibold have recently summarized these programs and have given a brief appraisal of the general concepts and the specific methods[1]. Their review, together with many published articles relative to the philosophy and operation of such assessment procedures, would be invaluable to anyone wishing to become familiar with the problems and techniques.

I assume that many in this audience are familiar with details of use-value assessment. Therefore, although I have been asked to discuss the Connecticut program and similar programs of the northeastern states, the presentation will be quite limited. Other questions, such as why the procedure evolved and what philosophic considerations relate to the technique, are probably of greater interest to us today.

The Connecticut Act

The Connecticut legislation, Public Act 490, is known as "An Act Concerning the Taxation and Preservation of Farm, Forest, and Open Space Land." In Section I, it is declared to be in the public interest to preserve farm, forest, and open space land and to prevent the forced conversion of such land to more intensive uses by assessments for taxation at values incompatible with current use. This declaration is crucial. It recognizes that the general public is the chief benefactor in the preservation of land in uses that will improve the local environment and quality of life. It avoids the creation of a special group as recipients of preferential taxation treatment. Any landowner who provides certain benefits to the public is eligible for use-value assessment. And, it achieves public goals in the use of land at minimum cost by leaving these areas under private ownership. Actually, these lands support a considerable tax base at the local level.

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[1] Thomas F. Hady, and Ann G. Sibold, State Programs for the Differential Assessment of Farm and Open Space Land, Agricultural Economics Report No. 256. (Washington, D.C.: Economic Research Service, U.S. Department of Agriculture, 1974).

How Does Land Use Enhance Environment?

Many benefits accrue to the general public from the maintenance and development of farm, forest, and open space land. In general, they concern the conservation and enhancement of the environment and the orderly development of urban, suburban, and rural areas. I would like to discuss four.

a. Separation of communities.

Planners are convinced that without direction the urban sprawl will soon create huge cities along main highway axes. This would be coupled with deterioration of aesthetic qualities of family living, excessive commuting, excessive investment in highways, air and water pollution, increase of urban slum areas, and an increase in poverty and crime. Alternative development forms are possible. One is to develop multiple urban centers--each of which would serve sub-regions with services, employment opportunities, and cultural needs, such as education and entertainment. The land areas between the centers would remain rural. Under wise planning, farm, forest, and open space areas under private ownership and operation could help achieve this broad public objective in urban development at little or no cost to society. On the other hand, public ownership or control would involve far greater cost and management problems.

b. Procurement and purification of water.

When open space land is used to create buffer zones, other major benefits are realized. An adequate and safe water supply is basic to an expanding population. Fields and forests are needed to catch and store precipitation, to act as barriers to contaminating forces, and to improve the quality of water in various stages of its use. From the standpoint of water conservation, these areas must be maintained to meet greater community water needs in the future. The establishment of "islands of open space" among the urban centers becomes of overriding importance as our population rises to new levels.

c. Purification of air.

Productive fields and forests make direct and essential contributions to air quality. A substantial quantity of carbon dioxide is utilized, and oxygen is released by each acre of crops or forest. Equally important is the diffusion and screening out of contaminants which occurs when open space separates communities.

d. Provision for recreation.

As our economy grows and improves in its productive efficiency, an increasing number of people will have more time and income for recreation. Outdoor functions based upon land and water activities will be in great demand. Present facilities are inadequate to meet this demand. Once again, wise land use can help achieve these broad recreational objectives of the public at minimum cost to society.

e. Other benefits.

Other environment contributions could be listed, but the same point

would be demonstrated again and again. The quality of our future environment and thereby the quality of life can be enhanced to achieve broad social goals. Open space is uniquely able to serve concurrent objectives of our society.

Who Qualifies?

An outstanding aspect of the Connecticut program is that any owner of land may qualify for tax reductions under the Act as long as his land useage contributes to the public interest goals. Three categories of landowners were designated, however, with different qualifying criteria.

a. Farmers.

In a determination of farm land, guidelines are furnished in the Act, but detailed specifications are avoided so that the assessor can exercise judgment about local situations. Such judgments are necessary because of the great variability in what constitutes a farm. In most cases, there will be no question whether an individual's land qualifies as farm land. Local knowledge will be sufficient to make the evaluation. In practice, deviations from the general case have occurred and have presented some problems. After designation, a farmer may apply for the tax reduction on all land owned by him.

b. Forest owners.

Non-farmers owning 25 or more acres of woodland may apply for certification by a state forester. If certain minimum programs are met, a certificate is granted and the owner may then apply under the Act.

c. Open space owners.

Each local planning committee or its equivalent may designate certain areas in a town as open space if it is necessary to a long-range development program. Any tract of land falling within such areas qualifies under the Act, and the owner may apply.

What Is Use Value?

The law did not specify the procedures for determining use-value levels. It indicated that for assessment purposes, value of qualifying lands shall be based upon "...its current use without regard to neighborhood land use of a more intensive nature." Use value recommendations were developed by a committee under the leadership of the Department of Agricultural Economics of the University of Connecticut. These recommended use values were based upon average productive capacity and feasible net income benefits. The procedures used in their development stressed simplicity in derivation and application, accuracy in evaluation of earning potential, and consistency among individual landowners and among geographic areas. The recommended categories and values are given below. They are subject to periodic review and update.

Land Classification	Suggested Average Value Per Acre
Tillable A (shade tobacco and nursery)	500
Tillable B (binder tobacco, vegetables, potatoes)	250
Tillable C (forage crops and cropland pasture)	125
Orchard	200
Permanent pasture	50
Woodland and sprout	25
Swamp and waste	10

Penalty Program

As originally passed, many persons familiar with the Act believed that speculators could take advantage of use-value assessments by holding land temporarily under its provisions and then selling for intensive development. This weakness existed and was corrected by passage of a conveyance tax on land which had been placed under P. A. 490 and was withdrawn within a period of 10 years after initial acquisition or qualification, whichever is earlier. A substantial penalty exists if a short period is involved. A schedule of the rates applicable to the total sale price is as follows: 10 percent if sold within the first year, 9 percent if sold within the second year, etc. After the tenth year in the program there would be no penalty associated with a shift to more intensive use.

Other State Plans

Each of the northeastern states has a program which involves use assessment as a major facet. Several resemble the Connecticut plan except for minor details. Others have similar plans that apply only to agricultural land. In several, programs of dedication of rural land for specific periods exist to qualify for use-value assessment. What appears to be the most comprehensive plan relates to agricultural districts of New York. This program will be discussed in detail immediately following.

Why Did Use-Value Assessment Evolve?

Any analysis of this question would probably be too simplistic, and my appraisal will be very limited. The problem appears to stem from the population explosion occurring in conjunction with limited land resources and a high level of effective demand for goods and services. These developments resulted in a great expansion of public services, especially at local levels. In attempts to meet the financial needs of these expansions through the local property tax, assessors set in motion a chain reaction of forces which were destructive of natural resources, social institutions, and human values. Historically, even in developing areas, such as the Northeast, assessors had used a de facto use-value assessment procedure, especially on agricultural lands. These values were reasonably similar to market values, at least enough so that all property owners accepted the difference. In the 1950's a march of development occurred with its related rise in local governmental costs. Sale of a tract of land at high unit value for development purposes results in similarly high unit value assessments for all nearby tracts.

Earnings from typical usage could not support such assessments, and these tracts were forced into development. The developments - especially housing units - led to increased local expenditures which could be met only by higher tax assessments and rates. So the cycle was complete and ready to repeat itself.

Specific examples can illustrate the problem. In Connecticut, cases existed in which the assessment rose from $200 to over $8,000 per acre in one year. One farm, which had been in the same family for eleven generations, had the property taxes increased from about $2,400 to over $28,000 from one year to the next.

These are extreme examples, but the general change in assessment procedures and tax rates had a devastating effect on agriculture in the rapidly developing areas of the Northeast. Prime agricultural land--a non-renewable resource--was lost to food production. The ecological benefits of all open space land were disappearing. First agricultural interests and then the general public decided that previously developed assessment procedures were improper for the current situation, and changes had to be made for the general social welfare. Thus, use-value assessment became an established procedure in property taxation of farmland and open space land and became a viable technique in land-use planning.

Philosophic Consideration.

Fundamental problems arise concerning the taxing power of government. The first few pages of Chapter 18 in Barlowe's recent book summarize many of the considerations relevant to this procedure[2]. A Supreme Court decision observes: "The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of the nation as the air he breathes is to the natural man. It is not only the power to destroy but also the power to keep alive." Further, Barlowe states, "Most governments are limited by constitutional principles or provisions that specify the conditions under which the taxing power can or cannot be exercised. And even in the absence of these limits, every government is limited in an ultimate sense by the fact that it cannot tax property beyond the point of confiscation or tax its citizenry beyond the point at which they will rise up in rebellion." Also, "The courts have held, however, that all taxes must be levied for public purposes and that they must be levied in an equitable and reasonable manner. Except in those cases in which constitutional limitations apply, legislatures can group or classify particular persons, properties, privileges, or incomes for taxation purposes. But these classifications 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" Some states provide that all property be assessed at "fair market value."

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[2] Raleigh, Barlowe, Land Resource Economics; The Economics of Real Property, 2nd ed., (Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1972). Ch. 18, p. 570.

In this brief review, some philosophic concepts show through. Governments can tax for special purposes but cannot destroy, and taxation may vary among groups if selection of a group is non-arbitrary and in the public interest. Thus, the constitutionality of use-value assessment is assured unless the state has specified "fair market values" as a criterion. Connecticut was fortunate in that this latter provision was not present as a constitutional limitation but as an operational directive. In certain other states a referendum has been required to permit use-value assessment.

The legality of the procedure seems secure. More importantly, in my opinion, is the question of the validity of use-value assessment. In a society oriented to the role of the "market" to allocate resources, fair market value was a rational evaluation technique to use in assessing property. The early economists advocated this procedure because the market was neutral and efficient. Market value assessment was adopted as an operational procedure. But as Boulding has pointed out, we have passed through the era of "cowboy" or "frontier" economics in which resources were to be exploited through the firm for profit maximization in satisfying consumer demand[3]. For many years our society has believed in the ability of the "market" to best allocate resources. When this concept is applied to land, some believed the "best" use would result. We are discovering fallacies in the procedure. The most important is the failure of the "market" to consider the social welfare aspects of various problems. Private goals do not necessarily correlate well with public goals. Many of our current environmental problems stem from this divergence. Therefore, a market value assessment base could and historically, often has, encouraged destruction of the environment.

In land use, the population explosion has brought an end to the era of dependence upon the market to identify the "highest and best use" for an informed society. Some higher and better use does exist--to be specific--the maintenance of farmland areas for food production and environmental benefits. If a different assessment policy is needed to achieve this goal, it must replace the former policy. Use-value assessment can direct the use of land resources to recognize the goals of an informed and mature society that has passed through frontier exploitive economics. Conceptually, use-value assessment is the only assessment technique that can correlate private goals with public goals. Market value assessment is a sub-routine that is useable only under a special situation. Unfortunately, our property taxation procedures and assessment practices developed during a period when the special situation obtained. I believe abandonment of market value assessment procedures of all real estate property is necessary to correlate private resource use with public goals.

My final comments concern extensive criticism of use-value assessment as a tool to hold land permanently in agriculture. Critics have argued that the procedure, without long-term commitment, provides only a holding action for land which eventually will shift to more intensive use. Further, they have maintained that speculators might use the taxing technique to hold land at low annual cost. There is substantial truth to both assertions, although most programs attach penalities if qualifying land is shifted to a more

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[3] K. E. Boulding, "The Economics of the Coming Spaceship Earth," Environmental Quality in a Growing Economy, H. Jarett, ed., (Baltimore, Md.: Johns Hopkins Press, 1966).

intensive use. However, these critics fail to point out that use-value assessment is conceived as only one tool in a group of tools needed to achieve optimum land use, and that other tools must be developed to solve the long-run problems of commitment and flexibility which will be part of an operationally acceptable land-use plan in areas, regions, states, and the nation. These tools are being forged at this very moment. Each one, however, depends heavily upon use-value assessment as one of the necessary supporting parts.

Having been associated with other workers on the forefront of property taxation problems in rural areas, I know of no one who considers use-value assessment to be other than a necessary part of a broader program. These are the men who are currently developing dynamic programs. But in urbanizing areas, especially in the megolopolis of the Northeast, if use-value assessment had not been developed and used, there would be little agricultural open space land left on which to apply new programs. The procedure bought 20 years of critical time needed to develop and perfect new programs and sharpened public opinion to the need for substantial attitudinal changes toward land--its ownership and its use.

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AGRICULTURAL DISTRICTS IN NEW YORK STATE: WHERE AND WHY THEY WORK

Howard E. Conklin

Let me start by asking you to call to mind one particular kind of area. The area I want you to think about has the following general characteristics:

1. An area of some 100,000 acres or more.

2. Close enough to an urban center for primary commuting if the center is under 500,000 people or at least secondary commuting (commuting to secondary centers from which others commute to the primary center) if the center is larger than this.

3. A population that doubled to tripled between 1945 and 1970 but with a school enrollment that did not increase this year. Much of the new housing constructed since 1945 is located outside villages and cities.

4. A per-family income average between $15,000 and $18,000.

5. At least 25 percent of the total land area being used by full-time farmers.

6. Farms that typically occur in scattered groups, or "pockets", with only a few that are isolated completely from the others.

7. Dairying, or other farm types that require high real estate improvement levels, predominate.

8. Three-quarters or more of the full-time farm businesses would be able to survive economically if not under urban pressure, though some farm consolidations could be expected.

9. The new plant and equipment needs per farm are $15,000-$20,000 per year. About a quarter of this is for real estate improvements.

10. New farm real estate improvements have almost no value for nonfarm uses.

11. Total investments per farm average $150,000-$200,000 if the land is valued at what would be its market price for farming only.

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12. About half the land that is not in farming is owned by urban workers who reside on it and use it for a country style of living.

13. The remaining land is owned by persons not living on it. Some one-half of these owners live outside the area. Many of these owners are hoping for capital gains as their principle return from ownership.

14. Most land that has sold recently has brought between $1,000 and $3,000 per acre but both sales volume and parcel size has declined in the past year or two.

Areas with these characteristics seem likely to exist in several of the states of the Northeast, though not in all. They are common in several areas of New York but do not occur below the Highlands of the Hudson nor on Long Island. Urbanization is more advanced in these latter areas. No name is fully satisfactory for the kind of area I am asking you to visualize. I call it semi-suburban for want of a better term.

With an area of this kind in mind let us next consider some general facts relative to the times in which we are now living:

1. The rate of population increase in the United States has dropped sharply in the past decade and continues downward.

2. The construction cost of single-family dwellings has risen sharply and is not likely to decline for many years. A large part of urban growth in semi-suburban areas has been associated with single-family dwelling construction.

3. Mortgage money for purchase of dwellings is scarce and costly, and it is difficult to believe that this can be greatly changed while we are fighting inflation.

4. Most new housing now is being constructed as apartments, mobile homes, and condominiums that require little land per person. A "confinement" living style is developing that will tend to reinforce the economic factors that brought it into being.

5. The cost of commuting is rising relative to other costs.

6. A scattered population is costly to service at the levels expected by nonfarm people.

7. A depressed stock market in combination with rapid inflation has diverted more than the usual amount of speculative funds to the real estate market in recent years.

Combining the implications of my second list with the characteristics of the semi-suburban area I listed, leads me to a third list. This is a list of likely events, now or in the near future, in my semi-suburban area:

1. Farmers are investing little in new real estate improvements. Barns are serviceable but becoming obsolete, soil pH levels are dropping if the soils are naturally acid, average field sizes are below those on farms further from metropolitan areas, and other farm improvements are not being

modernized to keep pace with competing areas. The $1,000-plus price for land provides the possibility of an attractive capital gain for many owners, and the scatteration of nonfarm people through much of the area is beginning to foreshadow restrictions on manure disposal, noises, pesticide use, and the like. It already is risky to leave machinery in the field at night, not only because gasoline is stolen but also because the machines may be vandalized.

2. The need for more revenue is a pressing local government problem. Tax rates have risen sharply, sparking many complaints. A revaluation of all property for assessment purposes is being considered or has recently been completed in the hope that it is a politically more acceptable method for extracting further tax increases. This revaluation is, or is to be, on the basis of recent market prices for "highest and best uses".

3. The revaluation has or will shift tax burdens toward owners of large areas of land such as farmers. Though the volume of land sales has dropped, land prices are still holding up, partly because price declines on the stock market have directed attention toward real estate, partly because landowners are not yet being forced to sell and are hoping for a market recovery, partly because the sale of small parcels reduces disproportionately the value of the remainder of farms for farming, and partly because most who build houses consider it more important, once they have acquired the needed mortgage money, to get the land they want quickly rather than to haggle on what will be a small percentage of their final cost. Traditionally, assessed values for farms were held much closer to farm values than the present "highest and best use" philosophy permits. Assessors gave the benefit of any doubt about the ultimate urban demand for land to the man who continued farm, though once he started selling house lots then his whole farm was judged to be worth house lot prices. In today's revaluations a farmer need only be in an area where someone is selling lots to have housing considered the "highest and best use" for his land. This is essentially tantamount to assuming that our whole semi-suburban area will become wall-to-wall city, though the revaluation appraisers have not thought about it this way.

4. It is likely that the latest planning report for the area speaks in bittersweet terms about great anticipated population increases, and local chambers of commerce and even government officials may believe that taxing farmers out of existence is a sad but necessary step in preparing for a promising future.

The failure of this year's school enrollment to rise can easily be passed off as the consequence of ephemerally low supplies of mortgage money. Many are not fully aware of the magnitude of the drop in the rate of population increase throughout the country and the strong current trend toward "confinement" living that is being so powerfully advanced by new but apparently durable economic forces. In any event, any given area may explain its promotional activities by pointing out that there still will be some growth and that aggressive policies may make it possible to capture what growth there is.

5. And finally, a longer run forecast. Our semi-suburban area will not become wall-to-wall city within the lifetimes of most now

alive. A deep resolve, however, that we shall not repeat the mistakes of the 50's and 60's, when people in many areas failed adequately to anticipate population increases, will press planners hard to make a new set of mistakes in the 70's -- the mistakes of over-anticipating population increases. Farming can easily be taxed and harassed out of our hypothetical area with nothing but brush to take its place, and efforts to prepare for great new waves of people are likely to encourage such taxation and harassment.

The New York State agricultural district law is intended to help counteract the effects of too enthusiastic anticipations of population increases in good farm areas. It permits actions at local levels that are designed to keep good farmland in farming until it <u>really</u> is needed for other uses.

This is not easy in areas where the urban expansion and scatteration of the 50's and 60's has created brilliant images of everlasting growth. Action on many fronts is needed. Farmers need to be given enough confidence in the future of farming to commit themselves to the heavy investment schedules needed to keep farming viable. Bankers, too, need confidence in farming, for farmers usually must borrow to invest. And something needs to be done to tarnish the brilliant images of new population waves that really are illusions now.

The agricultural district legislation permits farmers to band together to gain some measure of assurance that they will not lose what they invest in farm improvements through excessive taxes, restrictive ordinances, expropriation under eminent domain, and the like. This legislation also aims to cool somewhat the speculation that entices a farmer to stop making investments and to bet instead on a high-priced sale.

Farmers in the State have responded to the opportunities opened by the agricultural district legislation. More than 175 districts have been formed in the three years since the law went into effect. They encompass over 1.8 million acres.

Agricultural districts, however, have not been accepted in the lowest part of the Hudson Valley and on Long Island. There, other approaches are needed, and I am especially interested in the Suffolk County program for purchasing development rights and in the new ideas being generated in states like New Jersey and Maryland.

<u>Summary</u>

I have outlined a situation in which scattered nonfarm development has moved forward for two decades but in which it seems likely that future growth will be sharply curtailed. I have called this situation the semi-suburbs, and I have claimed that it is representative of important instances in many areas of the northeast. I have claimed further that a tendency to project the past is resulting in private actions and government policies more attuned to the past than to the real future. These actions and policies are often discouraging the continued farm use of good farmland even though for many years no other uses actually will be able to fully occupy these lands at the current speculative prices and high tax levels.

I have pointed out that the New York legislation permitting creation of agricultural districts is designed to give farmers encouragement and protection in these situations. I am confident that agricultural districts will be highly effective under these conditions--more effective, in fact, than police power measures. I am aware also, however, that agricultural districts are much less likely to be effective in areas that are in the advanced stages of urban penetration.

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VERMONT'S TAX ON CAPITAL GAINS IN LAND SALES AS A DEVICE TO CONTROL LAND SPECULATION

William H. Bingham

Before examining Vermont's capital gains tax on speculative land sales, it is necessary to look at the motivation for passage of this law. This is best done by considering the position of a community which has experienced heavy pressure from land speculators as the result of ski development.

Most of the building of ski areas occurred in the late 50's and 60's. With the opening of each area came the construction of roads to gain access to large parcels of land for condominiums, chalets, restaurants, and equipment shops. This by itself would not have had an adverse effect on the community. However, the pattern of development was one of scatteration, with the unused building lots being bought and sold like stocks and bonds as the land market flourished.

The effects of this development on a town were as follows.

1. all land was reappraised at the current market price;
2. town road mileage in some cases doubled over a five-year period;
3. much of the development was constructed on thin mountain soils with no adequate sites for on-site water and sewage facilities, necessitating large public investment.

Vermont's reaction was first the passage of Act 250, followed by a multitude of supplementary laws and regulations, including the tax on capital gains in land sales.

The law has two objectives: first to stop or slow land speculation, and second, to raise revenue for tax mapping and property tax relief. In order to avoid putting an additional tax burden on non-target individuals, the following land transactions are exempt under the law:

1. leases unless perpetual (99 years);
2. sale of gravel and soil;
3. sale of mineral or timber rights;
4. sales by federal government (State and local governments are subject to the tax);
5. sales made by publicly owned development corporations;
6. sales of up to 5 acres (up to 10 acres if zoning requires) as a site for a principal residence.

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The tax is levied only on land which requires the listers to appraise land and buildings separately. The amount due is calculated by subtracting the initial cost plus improvements from the sale price. The percent gain is entered in the appropriate column below, together with the number of years the land has been held by the transferor to arrive at the percentage of the gain due the State.

Years land held by transferor	*Gain, as a percentage of basis (tax cost)		
	0-99%	100-199%	200% or more
	Tax on gain		
Less than 1 year	30%	45%	60%
1 year, but less than 2	25%	37.5%	50%
2 years, but less than 3	20%	30%	40%
3 years, but less than 4	15%	22.5%	30%
4 years, but less than 5	10%	15%	20%
5 years, but less than 6	5%	7.5%	10%

(*Gain, as percent of basis, shall be rounded to the next highest whole percentage)

Performance of a tax of this nature is, at best, difficult to measure. If it accomplishes the objective of slowing or stopping land speculation it will not raise the expected revenues. The inverse is, of course, also true. This tax was expected to raise 3-5 million dollars the first year of operation. It actually raised only 1.2 million. Based on this observation it could be said that the tax accomplished the major objective of slowing speculative land sales. However, there are many other variables that affect the land market, not the least of which are the tight money market and the overall recessive nature of the economy.

Vermont's tax on speculative land sales is a specific tax aimed at a very small segment of the rural land-use problems facing the State. Within the objectives set for the law it seems to be effective.

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DEATH TAX POLICY: IMPLICATIONS FOR RURAL LAND USE*

W. Fred Woods

Death taxes are among the oldest and most accepted forms of taxation, first appearing in the Middle Ages as one of the institutions of feudalism. Under this system the ultimate title to all land vested in the sovereign, and inheritance could take place more or less only at his sufferance; the tax was therefore the "price" of this tolerance. In modern times, although the right of private ownership of property is vigorously defended in capitalist societies, the state protects the rights of the individual in his property and supervises its transfer at his death. Consequently, the state has long regarded property transfers by an individual to his heirs as appropriate objects for taxation.

Long considered minor, U.S. death taxes have in recent years received increased attention, as rapidly increasing size and value of typical farm estates, rising land values, and the progressive rate structure have contributed to the potential for larger death tax burdens. This increased attention has resulted in pleas for general death tax reform at the federal level, introduction of a number of proposals for preferential treatment of family farm estates, increased awareness of the need for estate planning, and at least a part of the substantial interest in land-use policy.

Death Taxes Examined

Death taxes assume two major forms: the estate tax and the inheritance tax. The inheritance tax is levied upon the separate shares of an estate that are transferred to heirs. It may be considered a tax upon the privilege of an heir to receive property. This is the oldest form of death tax, and the original feudal version bore many resemblances to the inheritance taxes of today. This form of death tax is levied by most of the states. There is no federal inheritance tax.

The estate tax, on the other hand, is levied upon the entire estate left by a decedent. This is the form of death tax imposed by the federal government, and although its revenue yield is not large in relation to that of the federal income tax, the federal estate tax plays a major role in the U.S. tax structure. In addition, a few states impose an estate tax, either instead of, or in addition to the inheritance tax.

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* Views expressed are the author's own and do not necessarily represent those of the U.S. Department of Agriculture.

Estate and inheritance taxes are justified by their proponents because: (1) inheritance is an indication of ability to pay; (2) inheritance represents unearned or windfall income to heirs; (3) death taxes serve to equalize opportunity (past unequal wealth distributions are partially corrected); and (4) death taxes are relatively easy to assess and collect and, moreover, can reach incomes and assets which may have avoided taxation during the owner's lifetime (7, pp. 251-253).

Opponents of death taxes contend that: (1) they are a frontal attack on the nation's capital base; (2) death taxes diminish and discourage savings; (3) death taxes may distort resource allocation through a forced preference for liquidity; and (4) they interfere with the continuity of closely-held business enterprises (including family farms) and may contribute to the breakdown of efficient productive units (7, pp. 254-5).

Although used as an emergency measure in previous periods, it was not until 1916 that the estate tax became a permanent part of the federal revenue system. The first estate tax carried an exemption of $50,000 and rates ranging from 1 to 10 percent. Today's exemption is $60,000, and marginal rates range from 3 to 77 percent. The $60,000 exemption has been operative since 1942 and the present rate scale was adopted in 1941. Substantially unexamined and unrevised in the intervening years, this stability of rate scale and exemption level is unmatched by any other significant federal, state, or local tax over this time period, except for the companion tax on lifetime, or inter vivos, gifts.

State Death Taxes

In general, all the states employ death taxes except Nevada. A few impose an estate tax, while most levy inheritance taxes. As previously noted, the inheritance tax is levied on distributed shares and typically applies lower rates to shares passing to close relatives than it applies to distant relatives or unrelated persons.

The federal estate tax provides a credit for a certain amount of state estate tax payments. Forty-six states employ an additional "pickup" tax to assure full absorption of this credit which amounts to 80 percent of the federal estate tax rates prescribed in the Revenue Act of 1926.

Death taxes and rates vary widely among states. In the Northeast, New York and Vermont levy an estate tax (table 1). Rhode Island imposes both an estate and an inheritance tax, while the remaining states use the inheritance tax. Tax rates for inheritances by spouse or children range from Maryland's 1 percent flat rate to New Jersey's 16 percent levy for amounts over $3.2 million, while New Hampshire imposes no tax on inheritances by these classes of heirs. Vermont's estate tax is most severe, 30 percent of the federal estate tax liability. In addition, Delaware and Rhode Island impose a state gift tax.

Revenue Impact of Death Taxes

The relative revenue position of federal estate (and gift) taxes has leveled off at about 2 percent of total federal tax receipts over the past decade, even though the amount of tax collected increased from about $1.6 billion in 1960 to $4.9 billion in 1973. This is slightly less than the

Table 1.--Selected state inheritance tax information, northeastern states, July 1973

States[1]	Exemptions			Rates		In case of spouse	
	Spouse	Minor child	Adult child	Spouse or minor child	Adult child	Size of first bracket	Level at which top rate applies
	------Percent--------						
Connecticut[2,3,4]	$50,000	$10,000	$10,000	3-8[9]	2-8	$150,000	$1,000,000
Delaware[2]	20,000	3,000	3,000	1-4[9]	1-6	50,000	200,000
Maine	15,000	10,000	10,000	2-6	2-6	50,000	250,000
Maryland[5]	150	150	150	1	1	10/	10/
Massachusetts[5,6]	30,000[11]	15,000	15,000	1.8-11.8	1.8-11.8	10,000	1,000,000
New Hampshire	--	--	--	12/	12/	--	--
New Jersey	5,000	5,000	5,000	1-16	1-16	10,000	3,200,000
New York[7]	--	--	--	--	--	--	--
Pennsylvania	0[13]	0	0	6	6	10/	10/
Rhode Island[2,8]	10,000	10,000	10,000	2-9	2-9	25,000	1,000,000
Vermont[7]	--	--	--	--	--	--	--

[1] All States, unless designated by asterisk, also impose an estate tax to assure full absorption of the 80-percent Federal credit.

[2] Exemptions are deductible from first bracket.

[3] The exemption shown is the total for all beneficiaries falling into the class and is shared by them proportionately.

[4] An additional 30 percent surtax is imposed.

[5] No exemption is allowed if beneficiary's share exceeds the amount shown in the exemption column, but no tax shall reduce the value of the amounts shown in the exemption column. In Maryland, it is the practice to allow a family allowance of $450 to a widow if there are infant children, and $225 if there are no infant children, although there is no provision for such deductions in the statute.

[6] Applicable to property or interests passing or accruing upon the death of persons who die on or after July 18, 1969, a 14% surtax is imposed in addition to the inheritance tax.

[7] Imposes only estate tax.

[8] Also imposes an estate tax.

[9] Rate shown is for spouse. Minor child taxed at same rate as adult child.

[10] Entire share (in excess of allowable exemption).

[11] In addition, an exemption to the extent of the value of single family residential property and to the extent of $25,000 of the value, in the case of multiple family residential property, used by a husband and wife as a domicile, is allowed where the property was held by them as joint tenants or tenants by the entirety.

[12] No tax imposed on these classes of heirs.

[13] A $1,500 family exemption is specifically allowed as a deduction.

Source: (6) pp. 297-8

federal tax imposed on alcoholic beverages and somewhat more than the federal tobacco tax.

State death and gift tax collections make up about the same proportion of total state tax collections as in the federal picture - approximately 2 percent. For fiscal year 1972 state death tax collections were $1.3 billion out of total state tax collections of $59.8 billion, or 2.2 percent. In comparison, individual income taxes and state sales taxes were 21.7 percent and 55.5 percent, respectively, of the total.

Reasons for Current Interest

How, then, do we justify the considerable current interest in what, from the standpoint of yield, seem to be only minor taxes?

Two reasons are perhaps of primary importance. First, the number of persons filing estate tax returns has increased substantially over the past three decades, from 17,000 in 1940 to 132,000 in 1970. (The increase in gift tax returns has been similarly large.) The uptrend in number of estate tax returns is partly explained by an increasing number of older persons in the U.S. population. But the filing of estate tax returns seems even more closely related to the growing dollar value of personal wealth components, particularly corporate stock and real estate holdings (9, p. 57). This growth in taxable personal wealth has, of course, been exacerbated by the inflation of recent years.

Secondly, although wealth is only a small multiple of annual income and turns over by death only once in a generation, estate and gift taxes do present complex legal, economic, and social problems. It has been charged that various provisions of the Federal estate and gift tax laws produce complexities in estate planning, encourage disposition of assets contrary to the best interest of taxpayers, beneficiaries, and the economy, and work gross inequities among taxpayers (10, Part I, p. 28). The same charge is without doubt made against the state death taxes.

The above reasons are particularly applicable to recent trends in agriculture, as the rapid appreciation in value of farm assets has made many more farm estates and their heirs face payment of death taxes than has been the case in the past. The average value of farm assets rose from $51,440 in 1960 to $169,744 in 1974. Concern over the status of the "family farm", long considered the "backbone" of American agriculture, and over disappearing farm and other open land in areas such as the Northeast have spurred numerous proposals to change the federal estate tax law in a manner that would potentially influence rural land use as well as the structure of American farms.

Death Tax Reform Proposals Affecting Agriculture and Rural Land

Although some individual state death taxes levy a sizeable "bite", by and large these taxes are not the prime concern of "death tax policy". This policy is primarily federal and only secondarily state. The rest of my remarks should be regarded with this premise in mind.

There is currently no active proposal for general federal estate tax reform. The administration proposal delivered to Congress April 30, 1974 (8) contained no specific estate or gift tax reform proposals. Identifying the principal issues as rates, the treatment of unrealized appreciation at death, generation-skipping, a unified gift and estate tax, and changes in the marital deduction, the Administration promised to work with the Ways and Means Committee in developing general reform proposals, but none has been formalized to date. The Administration message did, however, offer three broad guidelines for subsequent reform proposals:

(1) that changes considered be balanced in such a way as to not change the overall estate and gift tax revenues;

(2) that, regardless of changes, transition rules protect citizens whose estate planning had been done in reliance upon existing rules;

(3) that no changes be considered which would jeopardize the vitality of voluntary charities, which depend heavily on gifts and bequests.

Taxing the Appreciation of Capital Assets Transferred at Death

Of the issues identified above, the tax treatment of unrealized appreciation at death is perhaps of greatest interest to rural landowners. Under present law, the accumulation of wealth through savings from ordinary income -- wages, salaries, dividends, business profits -- is subject to the federal income tax as the wealth (income) is earned. Similarly, when a taxpayer sells a capital asset which has increased in value since he acquired it, the gain is subject to an income (capital gains) tax. When a taxpayer makes a gift of appreciated property, the recipient takes the donor's original basis so that the full gain is still subject to capital gains income tax upon sale.

In contrast, if a taxpayer holds an appreciated asset until he dies, the appreciation is never subject to the capital gains income tax. The whole asset is included in the estate and is subject to the estate tax, but the increment of appreciated value is never taken into account and taxed as income. This causes an obvious inequity in the income tax treatment of persons who accumulate their estates by means of untaxed appreciation in value, as compared to those who accumulate through savings out of taxable income, or to those individuals who, for various reasons, are forced to sell their appreciated assets prior to death. An estimated $15 billion in capital gains each year remains outside the income tax system as a result of the existing tax structure[1].

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[1] Figures compiled by the New York Stock Exchange indicated some $22 billion of capital appreciation passes annually in this manner and the Exchange estimated that the imposition of a capital gains tax would add $3.5 billion to federal tax revenues (11). In 1963, then Secretary of the Treasury Douglas Dillon told Congress that some $12-$13 billion in appreciated capital were transferred without being subjected to the capital gains tax. He estimated that a capital gains tax on appreciated property transferred at death or by gift would add about $750 million annually to federal tax revenues. The $15 billion figure is the current estimate by the U.S. Treasury Department.

Not only is there a serious inequity in this facet of the tax law, but also there is the tendency for assets to become immobilized. Investors become "locked in" by the prospect of avoiding the capital gains tax completely if they hold appreciated assets until death. This locking in of investments obviously has the potential to impede the efficient allocation of resources.

A suggested reform which has received considerable discussion would tax the appreciation in value of assets transferred at death or by gift in a manner similar to that of other capital gains[2]. Some of the features that could be expected in a formal proposal are:

(1) only appreciation occurring after a given date (possibly the date of enactment) would be subject to tax;

(2) the tax would be allowed as a deduction for estate tax purposes;

(3) taxpayers would be allowed some minimum basis, e.g., $60,000, so that no tax would be imposed when the total value of assets transferred is below this minimum level;

(4) gains on transferred assets would be eligible for income averaging.

However, as I have stated previously, no legislative proposal currently exists which embodies this or the other general issues identified in the Administration statement.

Specific Farm Relief Proposals

Several bills have been introduced in the current session of Congress which would authorize specific preferential treatment of farmland for estate tax purposes. Generally these bills fall into two types: one category would allow preferential assessment, for estate tax purposes, of farm and certain other open lands, provided certain conditions were met; the second would allow an additional deduction from the gross estate for certain interests in family farming operations.

The former approach is typified in the Mathias Bill (S. 2822 of the 93d Congress). Essentially this bill would permit, at the estate executor's election, qualifying real property devoted to farming, woodland, or scenic open space to be assessed, for estate tax purposes, at its value in those uses if such value were less than its fair market value. To qualify, the land would have to be in the approved use at the date of the decedent's death and for the 5 preceding years. Should the land be sold, or its use transformed to a nonapproved use within 5 years after the estate tax return is filed, additional taxes would become due. (A slight varia-

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[2] Currently the recipient of the gift of an appreciated asset takes the donor's basis in the asset. The payment of capital gains tax on the appreciation is thus not completely avoided, but is delayed until such time as the recipient may dispose of the asset through sale.

tion, S. 3541, also introduced by Senator Mathias, would require additional taxes, plus interest at 6 percent from the original filing date, if the property was converted from the qualifying use regardless of the lapse of time.)

The latter approach is exemplified in the Bayh Bill (S. 204 of the 93d Congress), which would permit an additional deduction for family farm estates passing to an individual or individuals closely related to the decedent or his spouse. The deduction would be equal to the lesser of $200,000 or the value of the decedent's interest in a family farming operation which is continually owned by him or his spouse during the five years prior to the date of his death. The estate tax savings must be recaptured unless the farming operation is retained by the beneficiary for at least 5 years after the decedent's death. In addition, the beneficiary must reside on the farm during such years and exercise "substantial" personal control and supervision over the family farming operation.

Neither the House Ways and Means Committee nor the Senate Finance Committee has held or even scheduled hearings on the above or similar bills. But on August 21, 1974, Senator Bayh offered his proposal in the form of an amendment to a minor tariff bill which had previously passed the House of Representatives. The amendment was accepted and the bill, H.R. 11452, is now in conference where the differences in House and Senate versions will be resolved. However, it is not known whether the Bayh amendment will survive conference[3].

Implications for Land Use

Certainly death taxes, in combination with other factors, such as the rapid increase in rural land values and the increase in size and value of farms, have some implications for rural land use. And potential changes in death tax laws at the federal level particularly may have further implications. Let's look briefly at some of these.

As a start, transfers for estate settlement and for inheritance and gift purposes have been roughly 25 percent of all farm real estate transfers in recent years (table 2). But 70 percent of all farmland transfers are voluntary transfers. Furthermore, there is no way to estimate how many of the estate settlement transfers (15 percent of the total in 1974) were influenced by the need to raise money for payment of death taxes. Although a potential liquidity problem exists for many farm estates (12), at least one recent study has suggested that the problem is less serious today than many of us have thought (2).

Added to the above information, 95 and 93 percent, respectively, of the farmland acreage transferred in 1973 and 1974 remained in agriculture, forestry, or recreation uses (5, p. 40). Thus, based on this limited evidence we cannot say that farmland is presently being diverted from agricultural uses on any substantial scale as a result of death tax burdens.

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[3] Subsequently the amendment was removed by the House and Senate conferees.

Table 2.--Farm real estate transfers by type of transfer, 48 States, year ending March 1, 1966-1974.

Year	Estate settlement	Inheritance and gift[1]	All other[2]	Voluntary	Foreclosure	Total
	Thousand transfers					
1966	27.4	11.3	4.6	93.7	2.8	139.7
67	21.6	13.3	3.3	91.2	2.4	131.7
68	20.4	13.7	3.0	87.5	3.0	127.6
69	20.4	13.7	3.2	85.6	2.7	125.6
1970	17.8	12.2	2.5	75.6	2.9	111.2
71	17.7	12.1	3.6	74.6	3.6	111.6
72	18.5	11.8	3.9	90.0	3.5	127.7
73	21.2	14.1		107.0	3.4	145.7
74	21.4	20.6		106.9	2.3	151.2

[1] Includes both inter vivos and estate transfers.

[2] Includes tax and miscellaneous sales.

Source: (5, p. 30) and unpublished data.

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A tax on capital gains at death would call for considerable assessment of its effect on rural landowners and land use. On January 1, 1974, farm real estate was valued at $325 billion (4, p. 2). Based on unpublished data from the 1966 Pesticides and General Farm Survey farmers' cost basis in their real estate is approximately half the market value. Supporting this estimate of the low "book" value or cost basis in land in comparison to high market values are the 1969 Census of Agriculture data for years on the farm by farm operators. Nationally, about two-thirds of the full-owner operators and three-fourths of the part-owner operators have been on their present farm 10 years or more (table 3). For the Northeast the comparable figures are 70 and 74 percent respectively.

However, such a tax on capital appreciation at death might not, at least in its early years, pose such a serious problem as might be expected at first blush. In all likelihood capital appreciation prior to the enactment of such legislation would receive forgiveness for taxes; therefore, only future appreciation would be subject to tax. Also, the resulting tax could be deducted when calculating the federal estate tax. Recall, as well, the additional probable features mentioned earlier.

The proposals to provide preferred estate tax treatment to farmland in certain estates are attractive but perhaps misleadingly so. The approach of allowing qualifying farmland, woodland, or open scenic land to be assessed, for estate tax purposes, at its value for those uses if such value was less than its fair market value, could well contribute to increased concentration of wealth in the U.S. Its provisions would benefit large estates more than small ones because of the progressive nature of the federal estate tax. Thus, such legislation could contribute further to the attractiveness of qualifying types of rural land as vehicles for wealthy individuals to employ in passing more of their assets to their heirs. Consequently, such legislation might well increase the demand for these types of land and contribute to further inflationary land price increases.

Since its benefit is limited to a maximum additional deduction of $200,000, the Bayh proposal would not benefit large estates over smaller ones to the extent of the first proposal, but inequities would nevertheless be introduced. In the first place, the approach restricts its benefits to rather rigidly defined family farmers. For instance, farmers would be required to live on their farms at least 5 years before their death, and the heirs would be required to live there 5 years after receiving the farm. A substantial number of family farmers currently do not reside on their farms but live in nearby towns. Nationally only 72.6 percent of farm operators report residing on their farm (table 4). This nonresidence on the farm operated appears to be a developing trend on the basis of the 2 census years, 1964 and 1969. An additional 20 percent of farm operators nationally have lived on their farms less than the required 5 years.

Also, and equally important, this kind of approach provides an incentive for the owner of a family farm to delay the transfer of the farm until his death in order to minimize estate taxes. Such an approach thus might mitigate against effective estate planning. Rather than delaying transfer until the death of the owner, a family farm is more likely to be continued if some or all of the farm is transferred to the heirs early enough in their occupational careers to provide them incentive for remaining on the farm.

Table 3.--Farm operators by tenure, by years on farm, 1969

	All farms	Full owners	Part owners	Tenants
	Percent			
United States				
Total	100.0	100.0	100.0	100.0
Less than 5 years	20.0	20.3	12.1	34.5
5 - 9 years	15.4	14.9	13.9	20.7
10 years and over	64.6	64.8	74.0	44.8
Northeast				
Total	100.0	100.0	100.0	100.0
Less than 5 years	17.0	16.4	12.6	40.3
5 - 9 years	14.3	13.7	13.9	21.7
10 years and over	68.7	69.9	73.5	38.0

Source: (1)

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Table 4.--Residence of farm operators by regions: 1969 and 1964

	Total farms operated		Percent residing on farm operated		Percent not residing on farm operated		Percent not reporting residence	
	1969	1964	1969	1964	1969	1964	1969	1964
U.S.	2,730,250	3,157,857	72.6	87.8	16.8	9.2	10.6	3.0
Northeast	151,866	202,194	83.1	91.7	9.0	5.8	7.9	2.5
North Central	1,151,884	1,277,387	78.3	89.9	13.0	7.6	8.7	2.5
South	1,161,399	1,372,732	65.6	86.1	21.3	10.4	13.1	3.5
West	265,101	305,544	72.3	84.5	17.9	12.6	9.8	2.9

Source: (1)

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Both approaches implicitly assume that present land use is optimum from the standpoint of estate owner, heir, and the general public. And, they represent an attempt to affect land use which historically has been a state and local province, through the vehicle of the federal tax code. Even if federal direction is the most desirable approach, the tax structure is probably not the most efficient agent.

Concluding Remarks

One of the purposes of my review of our current death tax policy, in addition to providing a general idea as to what it is, was to point out that it has essentially remained unchanged for a number of years. But in my opinion, this policy - both state and federal - is not unduly oppressive with respect to rural landowners nor any more inequitable than other segments of our tax structure.

The important message of the increasing death tax burden on family farmers and other rural landowners is that effective estate planning is becoming a necessity. What landowners need most is better estate planning within the framework of existing law rather than changes in the tax law.

Without doubt, death tax policy has and does influence rural land use to some degree, particularly in the absence of effective estate planning. And, failure of the states to institute effective land-use policies has probably contributed to this influence. Nonetheless, as suggested previously, a rationale exists for supporting the implementation of effective land-use policies over the use of death tax codes to achieve desired land-use patterns.

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WORKSHOP SESSION 6

Experiences with Development Rights, Public Acquisition, and Easements as Land-Use Control Techniques

THE EXPERIENCE OF THE BLUEPRINT COMMISSION ON THE FUTURE OF NEW JERSEY AGRICULTURE

Phillip Alampi

Ladies and Gentlemen, I am honored to have this opportunity to discuss with you this morning a subject that has been very important to me for many years -- that of maintaining a viable agriculture and, with it, the preservation of one of our most precious natural resources -- productive agricultural land. More recently, this interest on my part has been translated into a unique and innovative concept as presented in the Report of the Blueprint Commission on the Future of New Jersey Agriculture.

Dr. William L. Park, who brought the makings of this proposal to the Commission, gave you a comprehensive review of this development easement purchase plan yesterday. I will not duplicate his presentation. Instead, I want to share with you some of the experiences we have had in putting together this concept and in the responses we have had since April, 1973 when the report was published.

The Commission was appointed by me at the direction of our former Governor William T. Cahill and was made up of a broad spectrum of New Jersey citizens. Farmers were well represented but so were other segments of our social structure. We also included agribusinessmen, environmentalists, the clergy, and legislators.

Early in the work of the Commission, before there were any preconceived ideas on paper, we held three public hearings throughout the State. We set up eight individual task forces to deal with specific areas of concern to agriculture. We solicited papers from the experts in many fields of agricultural involvement.

From all of this input to the Commission, one clear thread began to appear. We must do something to hold our most irreplaceable asset -- the prime agricultural land -- from being lost forever and, with it, the consequent loss in our significant production of food. By the same token, we also found an equally impressive emphasis on the need to solve some of the pressing economic problems, including those of production, marketing, taxation, and farm labor. For without a profitable agriculture, the farmland we sought to preserve would be of little use.

The report was issued and speaks for itself. Our former Governor, in his Fourth Annual Message to the Legislature on January 8, 1974, said that

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The Honorable Phillip Alampi is Secretary, Department of Agriculture, State of New Jersey, Trenton.

he would prefer the concept of public acquisition of development rights as opposed to other private transfer of rights proposals. He furthermore said, "Public acquisition of development rights for fair compensation is a device which should be tried at least experimentally at an early date."

As you know, Governor Byrne's administration took over in January and other pressing problems dealing with the school funding issue and the tax proposals demanded higher priorities. Governor Byrne has said several times that land use will have a very high priority in his administration and that the Blueprint Proposal will be given careful attention.

It is just a fact of life that action on a matter of such broad interest and great importance will involve certain political decisions. I am glad that at least the question of the preservation of our agricultural land is not in dispute. Almost everyone sees the wisdom in that. The discussion centers in how to do it, and I am heartened again to know that the purchase of development easement plan is still involved in the decisions yet to be made.

But the fact that we do not have a firm position from the Administration on the Blueprint proposal or on some other proposal to save farmland has prevented us from moving ahead as fast as we should be moving. Time is a most critical factor in New Jersey, as the pressures on our land are enormous. We have been unable to carry on with the myriad of research and planning efforts needed to put such a plan into operation. We have not had the funds to proceed, nor would we have wanted to tackle this formidable task without the Administration's backing.

This is not to criticize anyone for not immediately endorsing this concept and telling us it was the only solution and to get going on it. We know there are serious questions to be answered -- divergent views to be explored. Moreover, it is essential that in order for both the people and government to make logical decisions on such an innovative plan, the legislation, with its detailed spelling out of the program, must be drafted.

Quite frankly, to this point, there just hasn't been any funding available to let us proceed that far. And, too, some research and gathering of data must precede even that step.

This brings me to the exciting experiences we have been having in the twilight of the no-go situation in which we have found ourselves. The cooperation of Dr. William L. Park and his staff at Cook College has been outstanding.

When the Commission decided to become inactive and let a broad implementing committee function under my chairmanship, Dr. Park, along with Richard Chumney, Director of the Division of Rural Resources of our Department, began to look at the research and planning needs to achieve our goal. Subsequently, Dr. Park committed some of his research funds to this work so that we could seek answers to some of the very basic questions.

These questions, which have been posed by the citizens who have reviewed the report, as well as by governmental officials who will be

implementing such a program, cannot be answered fully at this time and point out the fact that more specific research is needed. The Blueprint Report presents a carefully thought out concept, but it does not purport to have the complete plan and operating program finalized. That is our challenge now.

Let me share with you some of the types of questions asked: What will the program cost? Can we afford it? How will the easement values be determined? What will the effect be on the value of land outside the preserves? How would the easements be related to my farmland? Who would appraise my land? Can I subdivide my farm and give it to my children? How could we prevent the fragmentation effect of subdividing a 100-acre farm into five 20-acre farms? Isn't this an invasion of my constitutional rights to my land? Can the land ever be changed back to a developable area? How actively must this land be farmed?

There are many more questions and some of greater magnitude than those I've mentioned. You probably have others you'd like to ask; so you see we need to move ahead in our research, as Dr. Park is doing with the limited budget resources available for this work.

Charles Lambert joined the staff at Cook College as a consultant working with Dr. David Burns. Although their work has not yet been published, I have their permission to briefly mention some of their accomplishments.

1. A computerized study was made of the cash flow requirements of a development easement purchase program. Using a variety of assumptions and criteria, we now know that, with some minor modification, our funding proposal of a 4-mil real estate transfer tax is feasible. In fact, under some circumstances, the rate could even be reduced and we could still reach our objective.

2. A study was made of our farmland inventory and the numbers of farmers in New Jersey this year. Preliminary results indicate that we may in fact have a larger inventory of farmland and more farms than previous projections had indicated. The survey which was taken as a part of this study indicates that of those owner-operators having an opinion, slightly more had a favorable impression about the easement purchase plan than had an unfavorable impression. However, about 25 percent of all owner-operators knew <u>nothing</u> about the proposal.

3. A study was completed by the Eagleton Institute at Rutgers to determine the public reaction to the Blueprint Proposal. The results show that over 79 percent of the citizens think our farmland should be preserved for open space and food production, rather than used for housing, stores, and industry.

Eighty percent feel that the State should try to preserve the farmlands, and over 60 percent of these people feel that a tax of less than $\frac{1}{2}$ of 1 percent on all real property transfers would be acceptable.

It is interesting to note that two other informal surveys, which admittedly could show some bias, were taken in the State to determine public interest in this proposal. John Hunter, Cooperative Extension Service, managed a survey at the 1973 Flemington Fair which revealed a startling 98 percent of the nearly 1,000 respondents supported the preserving of farmland in permanent agriculture. Of these, 75 percent favored public financing to achieve the purpose. In this survey, 80 percent of the participants were nonfarm people from all New Jersey counties except Atlantic.

Another survey was made under the Morris County Board of Agriculture's leadership at the New Jersey Flower and Garden Show at Morristown in early 1974. Here the same strong favorable attitude was found. Over 96 percent of the 3,101 ballots cast indicated that they would support a constitutional referendum calling for State acquisition of development easements on farmland and a dedicated tax to finance the program. In this survey, information indicated that the support came from property owners and nonproperty owners, city dwellers, rural dwellers and suburbanites, and from many different counties.

Now, in addition to this more formal reaction, we have made literally hundreds of personal appearances at large and small gatherings throughout the State. We have presented the Blueprint story to groups in several other states and Canada. Requests for copies of the report and letters with comments and critiques have come from almost every state. We have distributed 12,000 copies of the report and thousands of the summary highlights of the report.

Our experience in a nutshell has been that people have difficulty in understanding the concept. Because it is new and complicated, some of them opposed it until it was explained carefully. In most instances we find that once people understand the program they like it.

That is not to say that there is no one against it. Our greatest opposition comes from some of the farmers. They just don't want the State to get involved in their business. And yet there are a great many farmers who endorse the plan completely and who are solidly behind it.

So, ladies and gentlemen, you can see that our experiences in New Jersey have been cooperative, limited, interesting, and frustrating, but definitely heartening. I wish we could say that our program is ready to go, or better yet, that it is working as planned. But we know from our pioneer experiences in farmland assessment that these things take time and hard work.

We think we have a good idea. We know we have a great need. We are willing to put our shoulders to the wheel and do what needs to be done to keep this the Garden State.

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EASEMENTS, ORDINANCES, AND LAND DEVELOPMENT TECHNIQUES: THE TRI-COUNTY CONSERVANCY OF THE BRANDYWINE

Thomas H. Pierce

I am pleased to have the opportunity of addressing this workshop on the subject of land-use control mechanisms at the local level and on the experience which the Tri-County Conservancy of the Brandywine, Inc. has had in developing certain of these mechanisms. I would first like to set the scene by illustrating land-use problems as viewed through the eyes of conservation organizations, then briefly describe my own organization and finally discuss three techniques the Tri-County Conservancy has developed to control some of these problems: easements, ordinances, and land development techniques.

Judging from my perspective with the Tri-County Conservancy of the Brandywine, Inc. in the southeastern corner of Pennsylvania, the term "rural" in the title to this conference on "Rural Land Use in the Northeast" is fast becoming euphemistic. The transition from rural to urban land is occurring faster than many of us realize. However, I feel that the concern expressed by environmental groups is not that development of itself is wrong, but that it occurs for the most part in such an unplanned, indiscriminate way that in the attempt to accommodate people's needs it is destroying the very qualities that make life in rural areas a unique experience. This point was made quite apparent to me in a recent visit to the Chester County Planning Commission located in West Chester, Pennsylvania, the county seat, 30 miles west of Philadelphia. On the office wall was a map of all large properties, 50 acres or more, classified for imminent development, either for single-family dwellings or multi-family planned residential developments. The properties were scattered throughout the County and had little relation to the Planning Commission's own plan which would restrict future development to the areas within the main transportation corridors where the new dwelling units could be properly serviced by regional public facilities such as sewer, water, and public transportation. Another example of this trend toward urban sprawl can be found in West Bradford Township, a previously rural Chester County municipality struggling under the weight of five Planned Residential Development applications. In another case, Buckingham Township, a primarily farming community in neighboring Bucks County, has been served with six curative amendments (a device designed to cure discrepancies or exclusionary practices in a local zoning ordinance, usually accompanied by a development plan calling for a greater dwelling unit density than that allowed by the existing township ordinance).

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The courts in Pennsylvania have done little to control the pressures for unplanned scattered development within these outlying rural areas. The present body of case law states quite clearly that a municipality cannot exclude any major type of land use and must provide for a reasonable amount of land area to be retained to accommodate each major category. In practice this principle is interpreted to mean that each township must provide for: industry, commercial use, apartments, townhouses, mobile homes, etc. There are townships in our area that have no more than 2,600 acres. Many other townships are located far from population centers and nodes of public facilities. Although there is a definite need for new housing and the added jobs which industry would bring to the region, the idea of making every township accommodate every category of land use is not the answer to the rural land-use dilemma. The courts have allowed for a proliferation of urban sprawl at the local level in an attempt to address a problem which could be more effectively handled at the sub-regional or county level. I think it is fair to say that the inability of government to adequately plan for and control land-use patterns has been one of the major underlying reasons for the proliferation of action-oriented environmental groups.

The Tri-County Conservancy of the Brandywine, Inc.

Our environmental organization, the Tri-County Conservancy, was founded in 1967. Like many similar organizations, it too developed over a land-use dispute. At issue was an attempt to develop an industrial park in the center of Chadds Ford, a small village on the Brandywine River, 25 miles due west of Philadelphia. The inappropriateness of this move was obvious to anyone who has had the experience of driving through Chadds Ford to get the feeling of the history and artistic legacy with which this village is uniquely endowed. The area was the site of the famous revolutionary Battle of the Brandywine and boasts the Brandywine Battlefield State Park. The village district is on the National and State Historic Register. Chadds Ford has also served as a focal point for the Brandywine School of Art. All of these facts add up to an intangible but extremely important contribution to the history and quality of life of the region. Chadds Ford was fortunate in that enough people were able to come together and raise enough money to purchase the land outright so that the artistic and cultural heritage of the area was preserved. Also in 1967, a mill along the Brandywine came up for sale. This was subsequently purchased by the original founders of the Conservancy and now serves the purpose of both a museum displaying the Brandywine School of Art and the headquarters for the Tri-County Conservancy.

Since its founding, the Conservancy has grown to include a full-time staff of 40 people, ten of whom are actively engaged in environmental programs. The three activities of greatest interest to participants of this workshop in my judgment are: the Floodplain Easement Program, the Model Environmental Ordinance Program, and the Land Development Program.

Floodplain Easement Program[1]

The Easement Program was initiated to preserve the floodplain along the main branch of the Brandywine River. The floodplain is not only important

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[1] A copy of our model easement agreement is included as a Supplement to this paper.

from the point of view of watershed management; it also provides an usually scenic vista to drivers along the river and to the many canoeists, hikers, and fishermen who use the Brandywine each year. We used the easement technique because with it we could avoid the untenable cost of purchasing the land outright and would not have to pay upkeep costs, since land under our easement agreement remains in private ownership and continues to be maintained by the landowner.

Three steps are involved in obtaining an easement under our program. First, the Conservancy pays for the services of a surveyor who walks the property with the landowner. The landowner points out the boundaries of what he considers to be his floodplain land. The floodplain is then surveyed, and the resultant plat becomes exhibit A in the second step which entails drawing up the easement agreement. Although our program concentrates on floodplain protection, the plat in exhibit A does not need to be restricted to fllodplain land. It can also cover steep slopes, farmland, and other areas of environmental concern. In the second step, the lawyer, who incidentally donates his time to the program, draws up the agreement restricting the use of floodplain land. The restrictions disallow logging, solid waste disposal, excavation, and the construction of any buildings or other structures such as billboards, and including roads, pipelines, etc. These restrictions are then written permanently into the deed to the property and run with the land when the property is sold. The third step concerns the appraisal of the development rights given up by the landowner. The Conservancy pays for the services of an appraiser who determines the value of the landowner's entire property before and after the easement has been donated. The difference in these two values is considered by the Internal Revenue Service as contribution credit to a charitable organization and as such is tax deductible. In addition to an annual tax deduction, an inheritance tax benefit is also obtained, since the appraised value of the estate is lowered by the easement restrictions.

The Easement Program has put over 450 acres of land under restriction and provides a useful mechanism for permanently preserving areas of critical environmental concern.

Model Environmental Ordinance Program

A second activity, the Model Environmental Ordinance Program, is also pertinent to the objectives of this Conference. The program provides to local government in handbook form a series of well researched, legally defensible land-use control ordinances[2]. The Handbook includes a preamble to each ordinance setting out the reasons for its adoption, stating how it should be adopted and putting the ordinance into perspective with both the existing body of Pennsylvania case law and State and federal legislation. The ordinances themselves contain numerous comments on important points of law and suggestions on how a municipality should fill in the blanks in the model to tailor the ordinance to a township's own particular situation.

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[2] The Handbook is made available only as part of a service to subscribing municipalities. This service may be obtained from the Tri-County Conservancy at an annual cost of $300.

The Ordinance Program provides an annual up-dating service to subscribers which includes a review of pertinent case law and legislation passed during the year as well as the creation of an additional ordinance or ordinances as the need arises. The Handbook presently contains five model ordinances: a floodplain ordinance, a runoff and erosion control ordinance, a planned residential development ordinance, a subdivision ordinance, and sections of a zoning ordinance. Under development as part of this year's up-dating service, in addition to revising the Handbook, are a mobile home ordinance, a clustering provision for the zoning ordinance, and an expansion of the runoff and erosion control ordinance dealing with methods for containing storm runoff on the site.

The program has been very well received by townships in our area and represents a means of organizing and making understandable the increasingly complex field of land-use control at the local level. I would strongly recommend to those of you here from state and county government that you consider implementing a similar program in your own area. We presently have twenty-four subscribers to the program, mainly townships, but also including federal and state agencies, counties, and boroughs. We are now exploring the possibility of expanding the service to include law firms and planning consultants.

Land Development Techniques

The final activity I would like to mention today concerns our work in the area of land development. This is an area that is unpopular with some conservationists, although we do not feel that it necessarily has to be so. Indeed, the development of land is an undeniable part of the real world which environmentalists must face up to, get involved in, and by that involvement influence its evolution. We must come up with new ideas and new methods that can be profitably incorporated into the development process.

The Conservancy recently helped organize the purchase of 200 acres of land along the main branch of the Brandywine. A separate corporation was set up with the Tri-County Conservancy acting as consultant. A first right of refusal was exercised in buying the property, since the land was about to be sold to a developer. The Corporation intends to develop the property. The idea of development has shocked many people and has initiated a number of conflicting rumors. However, we feel that we are in a unique position to demonstrate how houses can be built with the least amount of environmental damage, by leaving the most amount of open space, by providing for architectural input, and by working closely and openly with the township involved. We feel that the development of Roundelay can serve as a model for development throughout the area. The Conservancy plans to receive title to and define the open space. We later plan to maintain the open space and will receive a fee for this purpose from each property owner within the development. The Corporation will obtain township approval for the subdivision plan and then turn over the development phase to the builders. The builders working with us feel that if they can go in and do their job without having to go through the township, without getting embroiled in public meetings and paying out interest during the delay inevitably incurred in the subdivision review and approval process, there will be a dollar value to them which will be so attractive that they will want to repeat the process elsewhere. In addition, the unique tax position of the Conservancy allows the financial

backers of the Corporation to realize sizeable tax benefits by deeding to the Conservancy considerably more open space than the township requires under its ordinances. By relinquishing the development rights on approved subdivision lots, the partners will be able to offset the capital gains resulting from the sale of the lots which will be developed.

Conclusion

The rural land-use dilemma centers around the trade-offs between providing for the housing needs and public services on the one hand and the protection of environmentally critical land areas including floodplains, steep slopes, ground water recharge areas, and productive farmlands on the other hand. Any workable rural land-use policy will have to take into consideration both of these two important areas. The programs and techniques presented in this paper relate to the second aspect of the dilemma, that of preserving environmentally critical areas. We must not forget the need to integrate these programs into a policy which will also help solve the first part of the dilemma, that of providing for adequate housing, jobs, and public services for the growing population of the rural Northeast.

SUPPLEMENT

Model Easement Agreement

THIS INDENTURE, made this _____ day of _____, in the year of our Lord one thousand nine hundred and ,

BETWEEN, , a corporation of the State of Delaware, hereinafter called the "Grantor"

AND

THE TRI-COUNTY CONSERVANCY OF THE BRANDYWINE, INC., a corporation of the State of Delaware, hereinafter called the "Grantee",

WITNESSETH:

That the said party of the first part, for and in consideration of the sum of FIVE DOLLARS ($5.00), lawful money of the United States of America, the recipt whereof is hereby ackowledged, hereby grants and conveys unto the party of the second part, its successors and assigns, forever, an easement over and across all of that portion of the Grantor's lands and premises situate in

containing approximately acres of land, be the same more or less, shown as Easement Areas on Exhibit "A" attached hereto and made a part hereof, for the following uses and purposes: To prevent forever the following activities or uses of the premises excepting with the approval of the Grantee herein, its successors or assigns, in writing:

1. The cutting of trees, excepting those which are dead, decayed, diseased or dangerous.

2. The depositing, dumping or abandoning of any land fill or solid or liquid refuse, waste or junk thereon or therein, excepting effluent from buildings existing within said easement areas on the date of this Indenture, or whose construction is authorized in writing hereafter by Grantee, subject, however, to all the laws, rules and regulations of the State of Delaware and the Commonwealth of Pennsylvania.

3. The quarrying, excavation or removal of rocks, minerals, gravel, sand, top soil or other similar material from the said land.

4. The construction of all buildings, structures or works thereon, including billboards, signboards, or any structure of any nature whatsoever, excepting the repair, remodeling and replacement of existing buildings, structures or works as of the date of this Indenture, provided said repair, remodeling and replacement will not increase the area of ground surface upon which said structures are presently located.

The construction of private roads, driveways and parking lots is expressly included in the definition of "structures" as used herein. The construction of pipelines, drainage swales, poles, or any other facilities normally used in connection with supplying utilities or removing effluent or surface water drainage shall expressly be included in the definition of "structures" as used herein.

Grantee shall have the right to enter upon the easement lands set forth herein to inspect for violations of the aforesaid provisions; to remove or eliminate any such violations; and to perform such restoration as may be deemed necessary to restore the land after removal of said violations. Grantee shall have the right to seek any legal action of remedy at law or in equity to enforce the provisions set forth herein and granted under this Indenture of easement.

5. Nothing herein shall prevent Grantee from entering said easement areas for the further purpose of erecting thereon such signs or markers as shall be approved in writing by the Grantor herein during the period of time in which the remaining lands of Grantor contiguous thereto are owned by Grantor, its successors and assigns. Upon subdivision of the contiguous lands hereto by Grantor, its successors and assigns, said permission in writing shall not be required and the right of entry and to erect on easement lands set forth herein, signs or markers by Grantee, its successors or assigns, shall be absolute.

RESERVING unto Grantor the free right and privilege to the use of the lands set forth as Easement Areas in Exhibit "A" hereto, for all purposes not inconsistent with the grant made herein. Nothing herein shall be construed to grant unto the general public or any other person or persons the right to enter upon the easement lands set forth herein, other than Grantee, its successors or assigns, or its duly authorized agents, for the purposes set forth herein.

In the event the Grantee, its successors or assignee, shall cease to exist as a body corporate of the State of _____, this easement shall run to the benefit of such body corporate or persons as may be determined, under the doctrine of cy pres, shall have the rights contained herein.

Nothing herein shall be construed as to prohibit the incorporation of the lands described in Exhibit "A:, shown as Easement Areas, in any approved subdivision plan of the balance of the lands of Grantor herein as a portion of said lands for setbacks, open space requirements, area requirements, or any other purpose not inconsistent with the activities prohibited herein, or such other activities as may be approved in writing by the Grantee, its successors and assigns, as provided hereinabove.

IN WITNESS WHEREOF, Grantor has executed this Easement Agreement, the day and year aforesaid.

By _____

Witness:

Attest:

_____ _____

STATE OF _____)
) SS.
_____ COUNTY)

BE IT REMEMBERED, that on this _____ day of _____, in the year of our Lord, one thousand nine hundred and _____, personally came before me, the subscriber, a Notary Public for the State and County aforesaid,

, parties to this Indenture, known to me personally to be such, and severally ackowledged this Indenture to be their deed.

GIVEN under my Hand and Seal of office, the day and year aforesaid.

_____

Notary Public

THE RAMAPO (ROCKLAND COUNTY, NEW YORK) EXPERIENCE

Charles L. Crangle

The rapid action of land developers has resulted in many a nightmare for local government administrators, particularly in the rural areas which are least prepared to cope with resultant municipal service demands. Where springtime saw flowering apple trees and fallow pastures, the advent of autumn may see 500 new homes, a complex transportation system, and water and sewer arrangements that may or may not fit into the community's future large-scale service patterns. This is not to mention the school district problem, which can be a service horror all in itself. The fact that these service demands cost money - money which rural communities do not have - is an added complication.

The problem arises because the traditional American approach has been one of permitting the private developer by his action and initiative to determine the nature and extent of municipal facilities and services.

The restrictions on such free enterprise in our society have generally been limited ones -- zoning, which stipulates a land use pattern for the community and governs lot sizes and such amenities as set-backs; and land subdivision regulations, which set requirements for municipal approval of subdivisions, including certain restrictions on their design and service. Aside from these limitations, the developer is generally free to time his development at will; to follow a consistent pattern or to leap-frog from one development site to another. The choice has historically been his and is dictated basically by the best financial deal he can make.

The development problem has been particularly acute in those sections of New York State suburban to major metropolitan areas. One of these, the Town of Ramapo in Rockland County, attempted in 1969 to meet the problem in a new manner. Since the town's approach has been upheld as constitutional by the New York Court of Appeals (New York's highest court), it is worth describing and evaluating as a possible approach for similar municipalities.

Rockland County lies just north and west of New York City and is easily accessible to city wage-earners. The Town of Ramapo, itself, lies furthest west of the Hudson River, but began to grow rapidly in the 1960's. Much of its growth was directed in accord with a comprehensive plan and zoning ordinance adopted by the Town in the mid-60's. This plan in brief viewed a town consisting of several existing villages and a large amount of open space, evaluated the development demand and came to several

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conclusions concerning the carrying capacity of the land:

(1) The town must assume almost complete development -- about 90-95 percent.

(2) Industrial and commercial development would not be wholly discouraged in the town, but its location and extent could be controlled by zoning.

(3) The major development demand would be for residential purposes. The villages should take the major portion of high density residential development, and the town would not plan for high-rise structures, confining higher-density housing to that of the garden type.

The vigor with which development proceeded, however, convinced the town government and its planning board that the ordinary development control tools at its disposal were not enough.

In 1969 the Ramapo Zoning Ordinance was amended to provide for a Residential Development Use. This meant that despite the existing zoning, any new residential development required a special permit, based on demonstrated availability of the five major municipal services: sewers; drainage; public park or recreation facility, including public school site; roads improved with curbs and sidewalks; and fire house accessibility. Development points were assigned to each service category, and the developer had to demonstrate that his proposed development could show a total of at least 15 points if it were to achieve approval.

The amendment to the Ramapo zoning ordinance explains the general considerations that governed the restrictions in simple and concise fashion:

"The Town of Ramapo has been experiencing unprecedented and rapid growth with respect to population, housing, economy, land development, and utilization of resources for the past decade. Transportation, water, sewerage, schools, parks and recreation, drainage and other public facilities and requirements have been and are being constructed to meet the needs of the Town's growing population, but the Town has been unable to provide these services and facilities at a pace which will keep abreast of the ever-growing public need.

"Faced with the physical, social, and fiscal problems caused by the rapid and unprecedented growth, the Town of Ramapo has adopted a comprehensive master plan to guide its future development and has adopted an official map and a capital program so as to provide for the maximum orderly, adequate, and economical development of its future residential, commercial, industrial, and public land uses and community facilities including transportation, water, sewerage, schools, parks and recreation, drainage, and other public facilities.

"In order to insure that these comprehensive and coordinated plans are not frustrated by disorganized, unplanned, and uncoordinated development which would create an undue burden and hardship on the ability of the community to translate these plans into reality, the

following objectives are established as policy determinations of zoning and planning for the Town of Ramapo:

(1) to economize on the costs of municipal facilities and services, to carefully phase residential development with efficient provision of public improvements;

(2) to establish and maintain municipal control over the eventual character of development;

(3) to establish and maintain a desirable degree of balance among the various uses of the land;

(4) to establish and maintain essential quality of community services and facilities.

"The town, through its master plan, official map, zoning ordinance, subdivision regulations, capital program, and complementary planning programs, ordinances, laws, and regulations has mandated a program of continuing improvements which is designed to insure complete availability of public facilities and services so that all land in the town is capable of development in accord with proper planning. The haphazard and uncoordinated development of land without the adequate provision of public services and facilities available will destroy the continuing implementation and successful adoption of the program. Residential development will be carefully phased so as to insure that all developable land will be accorded a present vested right to develop at such time as services and facilities are available. Residential land which has the necessary available municipal facilities and services will be granted approval. Residential land which lacks the available facilities and services will be granted approval for development at such time as the facilities and services have been made available by the ongoing public improvement program or in which the residential developer agrees to furnish such facility or improvement in advance of the scheduled program for improvement of the public sector."

The amendment was, of course, challenged by landowners on the grounds that it affected the value and salability of their property. In the 1971 case of Golden vs. Planning Board of Town of Ramapo, the court showed itself sympathetic with the town's purposes, and found the amendment not in violation of the federal and state constitutions, stating, "where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for 'phased growth'...."

It is clear, however, that in approving the Ramapo approach the court was not approving a device for limiting growth, since they specifically comment on exclusionary zoning: "What we will not countenance...under any guise, is community efforts at immunization or exclusion. There is, then, something inherently suspect in a scheme which, apart from its professed purposes, effects a restriction upon the free mobility of a people until sometime in the future when projected facilities are available to meet increased demands."

Nor was housing an issue. The court noted that the town plan provided for low- and middle-income housing. While this is of lower density and limited in height by water service problems, the fact that it was governed but not excluded was probably a factor in the court's decision.

The pattern of development expressed in the town plan is, however, one designed to fill in the inner areas before undertaking development in more outer sections. In other words, it attempts to insure that leap-frogging of development does not take place. It also affords an opportunity for the community to measure its open space requirements as it proceeds, and thus insure that adequate provision is made.

It should be emphasized that there are no permanent limits to growth in the Ramapo ordinance; the controls are temporary and attached to service provision. If the developer is willing to finance needed services himself, in advance of the town program, he can obtain approval.

What is involved here is the use of zoning in a new way -- to control the pace of development in accord with a community's ability to finance attendant improvements.

The device obviously calls for a degree of planning sophistication. It has been noted that Ramapo had a master plan, official map, subdivision regulations, and a capital improvement program prior to enacting the described amendment. In addition, the caliber of the town administration and its planning board was high. The Town Supervisor was a lawyer and was concerned with development problems. The town attorney was also concerned with urban problems to a high degree. He is currently head of the urban law division at a major state university. The town's planning consultant was also of first caliber, a county resident, with long experience in planning for communities in the area.

The administration of the residential development use amendment has not been a problem. The town has an administrative assistant who is charged with handling the mechanics of applications. These are reviewed by a five-man Technical Review Committee, consisting of the planning consultant, the town building inspector, the town engineer, the drainage consultant, and the administrative assistant. Their recommendations are forwarded to the planning board, which must issue the required special permit for development.

The program assumes, of course, that the schedule set forth in the capital improvement program will be adhered to. Ramapo's Capital Program is divided into two parts: (1) a Capital Budget covering six years adopted by the Town Board pursuant to Section 99G of the General Municipal Law and establishing an order of priority for all capital projects as shown on the official map and Master Plan, and (2) a Capital Improvement Program establishing two further more general orders of priority for the seventh through the twelfth year, and for the thirteenth through the eighteenth year.

Rising costs have already been a problem. The capital improvement program is generally funded at an average of one to one and a half million dollars a year. The program was sold on the basis of keeping taxes on an even keel, following an economic study which demonstrated that this device would adjust growth to the ability of the town to meet its cost.

It is obvious that even a million dollars is buying less, and this in turn may affect the timing process. To a degree this danger is offset by failures to build because of cost, but because the town has followed a practice of approving applications for development in advance, when they were in accord with the capital improvement program timing, promissory notes may in effect be issued for future development improvements that may not in time be in accord with capital development progress.

At present, however, Ramapo is still firmly committed to its program and, following the court decision, developers have adjusted to it. The program is now in its fifth year. It has been watched with interest by neighboring communities with similar problems, and at least one of these is currently considering adopting a similar process.

Perhaps the most significant aspect of the Ramapo experience is the fact that here we have a local government recognizing its responsibility to play an active role in planning the development of its own land - to chart its own growth - rather than simply to react year after year to crisis situations created by private developers. This community had the courage to take available legal tools and adapt them to meet its particular need. More such individual innovation is badly needed.

Selected Reference

Elliot, Donald H., and Marcus, Norman. "From Euclid to Ramapo: New Directions in Land Use Development Controls". Hofstra Law Review, Vol. 1, No. 1 (Spring 1973), 56-91.

LINCOLN (MASSACHUSETTS) LAND CONSERVATION TRUST AND RURAL LAND FOUNDATION

Kenneth W. Bergen

The Land Conservation Problem. Lincoln, Massachusetts, is a beautiful rural suburb 15 miles from Boston. Together with its neighboring towns of Concord and Lexington, it is steeped in history. Its inhabitants live in Lincoln primarily because of its rural character, good schools, and proximity to work. Many residents are in professions or are corporate executives. Many are interested in conserving the land as well as participating in town government. The cost of property in Lincoln has risen dramatically so that many young families have been excluded, and the expensive houses are occupied to a great extent by older people having sizeable incomes. On the other hand, there is a considerable number of inhabitants, both young and old, with moderate incomes.

About 1966, the Wheeler family decided that it could no longer continue to own its 109-acre farm and two colonial houses that had been in the family for several hundred years and which consisted of open rolling fields and wooded slopes. Running through the farm is an old colonial road over which British soldiers, killed at the beginning of the American Revolution, were taken in horse- or ox-drawn carts to the Lincoln burial ground. Numerous developers made offers to buy the property, with the view to constructing about 40 houses facing blacktop streets running hither and yon through the land.

The Solution. The Wheelers loved their land and listened with interest to a group of Lincoln conservationists who proposed that the land not be developed in the ordinary way. The first proposal was that a half dozen citizens in Lincoln interested in building new homes buy the property, sell off the two colonial farm houses, and then divide the remaining land among them into six separate tracts. This was tried, but when the six potential home builders sat down face-to-face, each wanted the best lot without having to pay more than the person who would buy the worst lot. An entity rather than a group of individuals had to deal with the Wheelers.

Kenneth W. Bergen is Chairman of the Trustees of The Rural Land Foundation of Lincoln, Massachusetts, and a partner in Bingham, Dana and Gould, Attorneys at Law, Boston.

Editor's note: This is an adaptation of a paper prepared by Mr. Bergen as "Case Number One" for Case Studies in Land Conservation, a project of The New England Resources Center. Requests for copies of the original paper may be made to The New England Natural Resources Center, 225 Franklin Street, Boston, Massachusetts 02110.

Thereupon, the Rural Land Foundation was organized as a non-profit conservation trust. The organization was made non-profit, rather than profit-making, to avoid any conflict between those wishing as much conservation land as possible and those wishing a larger number of salable building lots. The decision to eliminate any profit for the backers was made only after a lively philosophical discussion as to whether the profit motive would be inconsistent with the basic conservation purpose. With a non-profit organization, there is no doubt that more and better land has been set aside for conservation than otherwise would have been the case. The trustees were empowered to buy and sell land as well as hold it for conservation purposes. Eight Lincoln citizens were named as trustees. Each trustee contibuted one dollar, which served as the Trust's capital. (Copies of documents are available from the New England Natural Resources Center.) The Wheeler family agreed to sell the property for $285,000, which was $20,000 less than the highest offer received from a developer (whether the Wheelers claimed a charitable deduction for income tax purposes is not known, but it would appear that they would have been justified in doing so.) The purchase was financed by a loan of $199,500 from a local savings bank secured by a first mortgage on the land and two farmhouses, a $50,000 purchase money loan secured by a second mortgage, and a loan of $35,000 from the State Street Bank and Trust Company in Boston. The real secret to the success of the financing effort was the credit given by the State Street Bank, which was willing to make loans to the Rural Land Foundation on the basis of separate $10,000 guarantees of 30 public-spirited Lincoln citizens. Without the profit motive, these guarantors had nothing to gain and everything to lose (except the preservation of open space in Lincoln) by signing the guarantees. Of course, those 30 individuals put up no cash, but merely signed the guarantees. Indeed, no cash would ever have had to be advanced by them unless the Rural Land Foundation had gone into the hole financially. Each guarantor became responsible only for his pro rata share of the State Street Bank loan, but his liability could not exceed $10,000. It turned out that no one ever became potentially liable for more than about $5,000, because the bank loan never exceeded $150,000 or one-half the aggregate of the guarantees. Liability under each guaranty continued until the loan incurred in connection with the Wheeler project was repaid. The last payment on the bank loan was made in 1971, about three and one-half years after the organization of the trust and the purchase of the Wheeler property.

Armed with ample bank credit and backed by a total of $300,000 of guarantees, the Rural Land Foundation employed the services of Max Mason, a landscape architect residing in Lincoln and sensitive to the preservation of the best natural features of the Wheeler Farm. Over a period of several months, a number of plans were submitted to the trustees by Mr. Mason until a satisfactory one evolved. Fifty-four acres of conservation land were set aside for the benefit of the public, including the colonial road, which was preserved as a hiking and riding trail. Eleven lots were laid out ranging in size from two to seven acres and restricted to a single home on each lot. Lots were priced at prices from $25,000 to $45,000, the price of each lot depending on its size and quality. Any brokerage fees had to be added to these prices. A single 1700-foot curved road was constructed into the property with all utility lines placed underground.

None of the trustees had had real estate experience, and it was with

considerable concern that this type of conservation program was undertaken. Fortunately, a friend experienced in real estate development counselled the chairman of the trustees on the financial aspects of the plan during their daily train ride to Boston. One of the trustees was a Harvard Business School professor who acted as treasurer. He paid all bills, received all cash, and kept meticulous records. When he moved away, he was succeeded by a dedicated certified public accountant. Another trustee was the Executive Secretary of the Town. He was familiar with road construction and guided the trustees in putting the road construction out for bids. He also kept a watchful eye on the surveyor, as well as the construction of the road, making sure that certain important trees and stone walls were preserved. The legal work, which was not as extensive as one might have suspected, was handled by a paid, highly competent law firm specializing in real estate. One of the guarantors, who owned a printing establishment, designed and produced (at cost) a four-page colored illustrated sales brochure describing Lincoln and the land and giving the telephone numbers of two of the trustees (one the chairman and the other the secretary of the trust) who, together with other trustees, showed the lots to prospective purchasers. Firm prices were placed on the lots. All lots were sold at these prices except for one or two which were sold by real estate brokers who added their commissions to the established prices. Each sales contract required that the siting and style of the house be approved by the trustees. A well-known architect, who was also a trustee, went over the plans of each house and made suggestions for changes prior to approval by the trustees. During the most active period the trustees met about every two weeks.

As it turned out, the endeavor was a great success. In addition to the 54 acres of open space originally set aside, another lot in excess of two acres in the central part of the housing area was permanently dedicated to open space. All of the open space was ultimately transferred to the Lincoln Land Conservation Trust which was better prepared to supervise the land and to cut trails. This trust continues to hold it permanently for conservation. All of the remaining lots have been sold, and there are now only ten houses on the Wheeler farm (instead of the forty planned by developers) in addition to the original two farm houses and nine acres of land (restricted against further building) for which the trust realized $105,000. All debts were completely paid off and the $10,000-guarantees returned to their signers at a party to celebrate the success of the Wheeler venture. The trust has somewhat more than broken even financially.

The Future. With this success behind it, the Rural Land Foundation has entered into a number of other projects, some of which have been completed successfully and others of which are still unfinished. In every instance, conservation has been the goal, and no land is acquired unless that basic purpose can be assured.

The primary criticism of the Rural Land Foundation is that it provided homes only for the well-to-do. Land prices in Lincoln have risen to a point where moderate-income families have difficulty moving into Lincoln. Realizing the importance of a diverse population in a town, the Rural Land Foundation has acquired a 69-acre tract, two-thirds of which will be set aside permanently as open space. The remainder will provide 123 moderate income housing units as well as a modern new commercial area. With the Rural Land Foundation in control of this important piece of land, the town has been assured that moderate-income housing and a shopping area will be in keeping with town objectives.

The question may be asked, why was it necessary to organize a separate organization when the Lincoln Land Conservation Trust was already in existence and when the basic purpose of both organizations was conservation? The answer is several fold. First, the activities of each organization are different. One is to receive, hold, and manage conservation land; the other is to compete with others in the purchase of large tracts of land, part of which should be sold, and the balance of which is desirable for conservation. One involves less risk taking than the other. Each requires a different skill and temperament of its trustees. Second, public-spirited citizens are willing to take on only so much responsibility. Two organizations divide the work and responsibility, making it easier to persuade good trustees to serve. Third, any tax problems of one organization which might arise under the complex federal tax rules applicable to charitable organizations would not affect the tax status of the other organization.

The trust form of organization, rather than the corporate form, was chosen because a trust was simpler and less expensive and did not necessitate the filing of annual reports with the Secretary of State of the Commonwealth of Massachusetts.

The Rural Land Foundation has been ruled to be an exempt organization under Section 501 (c) (3) of the Internal Revenue Code. Thus, if guarantors of loans should be called upon to pay any part of the loans, they should be entitled to a charitable deduction for the payment. To avoid private foundation status under Section 509 of the Code, it elected to become a satellite of the Lincoln Land Conservation Trust, which is a public charity, with the result that the trustees of the Rural Land Foundation are now elected by the members of the Conservation Trust. Under Section 509 (a) (3) of the Code, the Rural Land Foundation has been ruled to be not a private foundation. Any profits which the Rural Land Foundation might make should not be regarded as "unrelated business income" which would be subject to federal income tax. The reason for this is that the sale of land at a profit, or possibly a loss, is interrelated with the acquisition of conservation land.

In conclusion, the Rural Land Foundation has filled a gap in the conservation program of the Town of Lincoln. When large tracts of land come on the market, the town government is unable to move sufficiently rapidly to prevent the tract from being sold to commercial developers. In a number of instances, the Rural Land Foundation has stepped into the breech and purchased the tracts and thereby, hopefully, assured the town of enlightened use of the land.

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LAND PURCHASE AND DEVELOPMENT EASEMENTS IN SUFFOLK COUNTY, NEW YORK

Editor's note: John V. N. Klein, County Executive, Suffolk County, Hauppauge, New York, presented a verbal summary of the Suffolk County farmland preservation program as proposed by the Suffolk County Agricultural Advisory Committee and accepted by the Suffolk County Legislature. The Committee was appointed by Klein in the spring of 1972. Its report was presented to the county legislature in March 1974. The following are excerpts prepared by Howard E. Conklin, Cornell University, from the Committee's report submitted on March 26, 1974. This program won an award from the National Association of County Officials.

The Committee recommends that the County proceed with the farm purchase program on the following basis.

1. Emphasis should be on the use of available funds for the acquisition of development rights as opposed to the acquisition of fee title. In the cases where the County acquires fee title it should, prior to considering lease-back, offer to sell the "agricultural title" (ownership of the properties stripped of all rights except for use for agriculture) to other commercial farmers. Sale of agricultural title should be done on the basis of open competitive bidding with the sale to the highest responsible bidder.

2. Where feasible, the first offer to purchase development rights should relate to farmer-owned and operated land and on nonfarmer-owned land adjacent to it.

3. The preserved lands should, either by initial purchase of development rights or by carefully selected processes of assembly, constitute relatively large tracts, preferably a minimum of 200 acres in size. Preservation of individual isolated farms would not be conducive to continued commercial agricultural operation on them.

4. Preserved farms should be bounded to the maximum extent possible by existing roads or highways or other open spaces, so as to provide for a buffer or insulation zone between the farm activity and other nearby residential or commercial uses.

5. Development rights once purchased by the County could not be sold or otherwise transferred by the County without affirmative approval of the voters in a countywide referendum, as is the case with properties dedicated to the Nature Preserve and Historic Trust, under the provisions of Article I of the Suffolk County Charter.

6. The program of participation in the acquisition of development rights by the County should be on a voluntary basis by the members of the farming community without resort by the County to unilateral action through the use of condemnation.

PROCEDURE

7. The first program of purchase of development rights should be conducted by the County simultaneously in three locations on the North Fork, South Fork, and Riverhead areas, respectively. Within these three major regions an area within each, of substantial size, should be defined with a clear, definite description as the area in which the first purchase of development rights will be undertaken. The selection of those three areas should be made on the basis of the application of the following criteria:

(a) soil suitability;

(b) present land use;

(c) contiguity of farms;

(d) developing pressure;

(e) price of land.

The Committee submits that the application of these criteria may well be made with varying emphasis within the three localities involved so as to reflect local conditions and considerations.

8. Once the three separate preservation areas have been designated, the County should announce the precise location of the areas and solicit formal sealed bids from the landowners within those areas, in which bids the landowner specifies the price he is willing to accept for development rights to his property. The bidding process should be handled with the same degree of formality and care as in any other purchase required to be made under the competitive bidding laws of the State of New York. The bids in all three areas should be made returnable simultaneously and opened simultaneously. The County should, of course, retain the right to reject any and all bids in the event it should desire to do so for any reason, including a price offering at a level greater than the appraisal of those development rights according to an independent appraisal obtained on a confidential basis by the County. In those instances where the County actually obtains full title to the property and, in accordance with the recommendations above, offers the sale of the "agricultural title" to such properties, it should do so with the same formalities of open competitive bidding as it does in the purchase of development rights. The County may, however, wish to consider extending preference, as to the right to purchase, to farmers in the same area, on a competitive bid basis.

9. It is contemplated that farmers offering the sale of development rights may do so as to less than the full extent of their holdings,

recognizing, of course, that the County has the right to reject any such offering if it deems the offer impractical.

10. A special committee should be established to recommend to the County Legislature the first large areas to be selected for the solicitation of bids and to make recommendations to the Legislature with respect to those properties offered for sale of development rights to the County. The Agricultural Advisory Committee recommends that such a special committee be constituted of the County Executive, a member of the County Legislature, Mr. Daniel Fricke, representing Cooperative Extension, the Director of Planning of the County, one representative of each of the four towns of Southold, Riverhead, East Hampton, and Southhampton, designated by the respective town boards of each town, and Mr. Horace D. Wells, former representative of the Suffolk County Extension Service.

The Agricultural Advisory Committee points out that the concepts and procedures outlined above provide an extraordinary opportunity for imaginative and innovative preservation techniques at minimum risk. For example, it is possible that a farmer who owns and operates his farm could readily sell his development rights to the County, retaining the agricultural title to his own land, while using the proceeds of the sale of his development rights to acquire the agricultural title to adjoining land or, indeed, land within reasonable proximity suitable for expansion of his farming activity. The Committee further pointed out that it is its belief that the concept and procedure outlined above will be extremely attractive to legitimate farmers anxious to remain in the agricultural industry in Suffolk County, but hard-pressed by periodic cash shortages and ever increasing real property taxes, as well as the threat of extensive complications and problems of liquidation upon the death of the farmer. Through the sale of development rights, he liquidates the greater proportion of his total equity in the value of his real property and converts it to cash which, in turn, can provide him with operating capital, investment capital, or income-producing investments. The conversion of the development rights from real property into cash also places the family in a position of avoiding forced liquidation at a sacrifice price at the time of the death of the farmer. The real property tax picture also brightens for such a participating farmer in that assessments of real property must be made in full recognition of actual value. The sale of development rights thus precluding the use of the property for anything other than agriculture in perpetuity reduces the market value of the property by virtue of that limitation, and since the assessed valuation must be a percentage (equalization rate) of full value, the tax contribution becomes lowered.

The Committee points out that while the purchase of development rights provides a great benefit to the farmer, it also provides enormous benefits to the people of Suffolk County now and in the future, through the preservation of a vital industry and extensive open space. Furthermore, the development rights concept provides for the retention of ownership and possession and maintenance of the property with the landowner who, through the pride of ownership and possession can be far more effective in maintaining the physical condition of the property than the County. There are, of course, many other benefits, all of which are outlined in a report the County Executive to the County Legislature submitted on October 15, 1973, which will not be restated here.

The Committee wishes to conclude by stating that in its unanimous judgment the careful implementation of the Farm Preservation Program outlined above will place Suffolk County in a position of national leadership. Since this program is the first of its kind, it will be watched nationwide and it, therefore, must be undertaken with the highest degree of precision and care and with all available safeguards so as to insure its success and to prevent the potential for misuse and abuse. This report is a synopsis of many hours of open discussion, debate, and deliberation by the Committee. Interests of clarity and brevity dictate that the substance of those discussions and all of the issues not be repeated in detail here. The Committee, however, stands ready to expand upon any aspects of this report at the time of its presentation to the Suffolk County Legislature.

Since the preservation of agriculture as an industry, and the preservation of agricultural land in Suffolk County, involved a multiplicity of concepts and approaches, in addition to the purchase of development rights and fee title, the Suffolk County Agricultural Advisory Committee will continue, as requested by the County Executive, to meet with regularity and deal with programs to achieve these objectives.

Mr. Klein in his verbal comments reported that the Suffolk County Legislature has made $60 million available for this program. He also indicated that while a small acreage has been purchased in fee title, major emphasis will be on the acquisition of development rights only. He reported hopes for speeding up the acquisition process in all parts of the County.

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THE NATURE CONSERVANCY PROGRAMS IN THE NORTHEASTERN STATES

Bradford C. Northrup

The Nature Conservancy is a national non-profit organization whose resources are devoted solely to the acquisition and protection of natural land. The major thrust of the Conservancy's activity is toward protection of critical environmental areas whose natural quality is such that they are important to preserve if the biotic diversity of the earth is to be maintained. I would urge you to think of our organization as a vehicle through which lands are transferred into a protected status.

Organizationally, the Eastern Region of the Conservancy is headquartered in Boston. In addition, the Eastern Region maintains a Northern New England Field Office in Vermont and a Mid-Atlantic Field Office in Arlington, Virginia.

The Conservancy's program has always depended upon the work of dedicated volunteers to promote the work of The Nature Conservancy in particular geographic areas. In addition, the Conservancy has evolved a program of complementary relationships with state and local conservation organizations. By making available its staff and financial resources and coordinating land conservation activity, the Conservancy believes it can assist in eliminating duplication and competition in the land conservation field and strengthen local efforts. Included among organizations that have an affiliation with The Nature Conservancy are the Maine Coast Heritage Trust, Bar Harbor, Maine; the Society for the Protection of New Hampshire Forests, Concord, New Hampshire; the Trustees of Reservations, Milton, Massachusetts; the Audubon Society of Rhode Island, Providence, Rhode Island: North Jersey Conservation Foundation, Morristown, New Jersey; and the Western Pennsylvania Conservancy, Pittsburgh, Pennsylvania.

I'm going to talk mainly about the acquisition activity of the Conservancy. There has been considerable growth in the organization's ability to acquire property, moving from a rate of acquisition of approximately 30 or 40 tracts per year in the late 1960's to the present level of activity, which encompasses on the average of one deed transferring to the Conservancy every working day. The Conservancy over its 21-year history has completed approximately 1,200 separate acquisitions and is responsible for the preservation of 750,000 acres of land in the United States, the Virgin Islands, and Canada. The Conservancy has been particularly active in the Northeast, where approximately 550 separate land conservation projects have been completed. This represents nearly one-half of the projects completed nationwide

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Bradford C. Northrup is Eastern Regional Director, The Nature Conservancy, Boston.

and highlights the great activity and support given the Conservancy in this area. The Boston office consummated over 75 projects in 1973.

Basically, the Conservancy works in three ways to conserve and acquire property: by gift, by purchase, and by government cooperative activity. The following are representative of the Conservancy's recent activity.

The Rachel Carson Seacoast Preserve, Maine

In memory of Rachel Carson (a co-founder of the Conservancy's Maine Chapter), we have created an aggressive and extremely successful Maine coastal program. Over 30 Maine islands and coastal properties have been preserved, including seven additions within the past year. A notable feature of this assemblage is the innovative use of conservation easements as a land preservation tool. We allow groups such as Outward Bound and the College of the Atlantic to use these properties for scientific and educational purposes.

H. Laurence Achilles Preserve, Vermont

This preserve, containing Shelburne Pond, is only six miles from downtown Burlington, Vermont, and is one of the top identified natural areas in the State. In 1973, the Conservancy purchased a key parcel of 90 acres of marshes, woodland, and pond frontage. In 1974, two additional parcels brought the H. Laurence Achilles Preserve holdings to almost 200 acres. Over $50,000 has been raised for this project to date. The land will be used and managed by the University of Vermont.

Lord's Cove, Richard Cooper Marsh, Connecticut

This 56-acre gift to the Conservancy is prime floodplain and tidal marsh at the mouth of the Connecticut River. An additional gift of contiguous property will expand this sanctuary in 1974. The Connecticut Chapter of The Nature Conservancy will provide for stewardship to protect its fragile ecosystem. This acquisition is an example of the Conservancy's program to protect the nation's vital coastal wetlands.

Little Egg Harbor, New Jersey

An example of the Conservancy's government cooperative program, this 4000-acre coastal wetland is protected from development by the ability of the Conservancy to negotiate and finance this acquisition in advance of the ability of the U.S. Fish and Wildlife Service to purchase. Owned by a real estate developer, the $1,360,000 purchase was financed for the Conservancy by Equitable Life Assurance Society of the United States for below prime rate. The involvement of this insurance company points out the success the Conservancy has had in convincing various financial institutions to lend money for land conservation projects. This land will become part of the Barnegat National Wildlife Refuge.

Great Dismal Swamp, Virginia and North Carolina

The Great Dismal Swamp is a unique ecosystem of great complexity, including evergreen scrub bogs, loblolly pine barrens, and cypress swamps. In 1973, the Union Camp Corporation donated nearly 50,000 acres within

Virginia's Dismal Swamp to the Conservancy. This tract, which includes Lake Drummond, is the largest corporate gift ever made to a private conservation organization. Additional acquisitions in Virginia and North Carolina have increased the size of the preserve to more than 64,000 acres, with more tracts under negotiation. We have conveyed some of this land to the Department of the Interior for the creation of a national wildlife refuge.

The Conservancy has found interesting ways in which to finance its government cooperative projects by turning to insurance companies for short-term, low-interest loans. Both Aetna and Equitable Life Assurance Society of the United States have been cooperative in providing funds for these land conservation projects.

The Conservancy is presently involved in a State Natural Heritage Program which is designed to bring a task force of individuals with a variety of expertise under contract with state governments, to assist them in State Natural Heritage systems. This would include developing guidelines for natural area inventorying, computer systems for update and maintenance of such an inventory, model legislation for a natural area protection program, and recommendations for organizing and staffing such programs. The Conservancy has been successful with contracts in South Carolina and Mississippi and has several other states in which it is presently negotiating.

The Conservancy has recently signed a contract with the Department of the Interior to produce a paper offering recommendations regarding actions on the part of the federal government to preserve natural areas. Part of this process will include a conference in Washington on November 11 and 12, 1974 in which recommendations for the future of the natural area movement will be evaluated by major leadership in the natural area field. The final recommendations will go to the Department of the Interior on February 1, 1975.

I want to interject a few comments about the action of The Nature Conservancy and other private land conservation organizations. Basically we are organized to exploit existing economic mechanisms to preserve land. Often this leads to an opportunistic approach to conservation, and as a result serious questions can be raised regarding the criteria used for land acceptance and the priorities established on this reactive basis. For this reason, all private conservation organizations should be supporting wise land-use planning. The growth of the land-use movement has provided valuable guidelines for organizations such as the Conservancy in establishing acquisition programs which have built into them priorities that will bring the best land in first. This has moved my organization away from the "give me your acres" philosophy that got us through our early years.

Opportunistic land acquisition can be a dangerous thing, particularly on the urban fringe, where growth makes present land-use decisions critical. When the Conservancy takes land in these areas, its use is fixed, and we are pledged to prevent future development of that land. It has always been our concern that in doing this we are perhaps forcing development into other, more environmentally critical areas. In addition, our present decision process avoids social questions, which are often as important as environmental considerations in the urban areas. Consequently, we welcome the use of inventories of natural areas and land-use planning, and are committed to making it part of our work.

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Adams, Alexander B. Eleventh Hour: A Hard Look at Conservation and the Future. New York: G. P. Putnam & Sons, 1970.

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WORKSHOP SESSION 7

Experiences with Influencing Public Agencies and the Legislative Process

PANEL: CITIZEN INFLUENCE ON RURAL LAND-USE POLICIES THROUGH THE WORK OF STATE COMMISSIONS

Editor's note: The panel included presentations on the work of state commissions or committees in Connecticut, Maryland, and Pennsylvania.

THE CONNECTICUT GOVERNOR'S TASK FORCE FOR THE PRESERVATION OF AGRICULTURAL LAND

Donald A. Tuttle

I am sure you all remember the story about the Missouri mule. It said that in order to attract his attention you hit him between the eyes with a 2x4 and then proceeded with the job at hand. People in Connecticut as well as the rest of the nation had grown very complacent about the abundance of food and energy. Last winter the good Lord lifted his stick of attention, and we were hit between the eyes with an energy crisis, an ice storm, and a truckers' strike.

These three events shook us up in no uncertain terms, and as we shook our reeling heads to clear our thoughts, we discovered that a) we were three million people on three million acres at the end of the transportation line and quite isolated for a short period of time; b) that our population was still growing, not always by the sheer delight of natural conception, but by the sometimes painful process of osmosis by immigration; c) that since 1949 our agricultural lands had decreased by 50 percent down to 500,000 total acres, with 162,000 tillable; d) that our farms had likewise been sliced to the point where we have only 2,600 full-time economic profit-making family farms; and e) that farmers have an alternative--they can sell their land for development.

Having been awakened to the problem by the 2x4 bolt from our heavenly Creator, we immediately formed an earthly committee to define our situation. This group is called the Governor's Task Force for the Preservation of Agricultural Land. We discovered through an inventory that in many areas in Connecticut we are wall-to-wall people, supported by a foundation of evenly poured asphalt and concrete. How did we come to this startling conclusion? I'll have you know that we here in Connecticut are blessed with great intelligence and sophistication. We have in the field of education those great institutions such as Yale University, Trinity College, Wesleyan University, and the University of Connecticut. In industry we

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Donald A. Tuttle, Secretary of the Commission, is Director, Board of Agriculture, State of Connecticut, Hartford.

have General Electric, Pratt & Whitney, Charles Pfizer & Company, and Electric Boat. In science we have, to name one very important institution, Hamilton Standard, which built the backpack that enabled man to walk on the moon.

With these great resources the Task Force moved onward and upward and discovered an all-important but little-known fact: we learned that zoning is a manifestation of man's ignorance concerning land use. In the name of planning and zoning we built roads and shopping centers and commercial enterprises and apartments and condominiums and town houses--thinking not of soil support but of grand list support, not of how to feed our citizenry, but rather of how to fatten our pocketbooks. So having made this momentous discovery--what to do--let's have a formula.

One formula coming up: Affluence + Zoning = Effluent. Having discovered this mysterious equation, we also discovered that over the years the results of this formula have been spreading from Connecticut to California like septic waste undulating on top of clay soil. So having defined the problem and realizing as a result of this and other like meetings that most of the rest of our neighbors shared the dilemma, we decided in the good old-fashioned pioneer Yankee spirit to take it to the mat and wrestle with it. To do this, we as a task force, made up of farmers, soil scientists, environmentalists, conservationists, economists, government leaders, real estate interests, and foresters, are seeking to apply a full-nelson and bring the problem to the mat for a count of three.

This august body came up with six challenges: a) how to preserve what agricultural land is left--we are proposing the technique of the purchase of development rights; b) how many acres are to be preserved--we are suggesting 325,000 on which we can produce 1/3 of Connecticut's food needs; c) cost of preserving--we think we will have to pay between $1,200 and $1,500 per acre; d) who designates what areas to be preserved--we are suggesting that a zoning or planning board in each of our towns, working in cooperation with an agricultural subcommittee, do this most difficult job, based on classification of soils; e) how to foot the bill--we're still working on it; f) what authority or commission will run the show--we're still working on that one, too; g) how to sell this program to the Connecticut Yankee who was shaken up by the blow between the eyes but not fully convinced that, when our collective heads are clear, the problem won't just go away. As we have researched the problem and done our scholarship, we created a parallel program, which I have called a "Communications Caravan" that has seen members of the task force speaking on some 20 radio stations, three television programs, and some 40 personal appearances before any and all groups who invited us. We are determined that the citizens of Connecticut will not be surprised or shocked when the task force comes out with their recommendations.

We hope that having been alerted by the initial blow between the eyes, we have recovered sufficiently to look at our problems realistically and will take positive action.

Editor's note: The report of the Governor's Task Force for the Preservation of Agricultural Land may be obtained from Donald A. Tuttle, Director, Board of Agriculture, State Office Building, Hartford, Connecticut.

THE MARYLAND COMMITTEE ON PRESERVATION OF AGRICULTURAL LAND

Frank L. Bentz, Jr.

The Maryland Committee on Preservation of Agricultural Land was appointed in June 1973 by the Maryland Secretary of Agriculture, Honorable Young D. Hance, in response to a Maryland Senate Resolution which called for a study of ways and means of preserving agricultural land and requested recommendations for such preservation.

Recognizing that planning for agriculture does not take place in a vacuum, Secretary Hance appointed an eighteen-member committee, including five farmers; representatives of the State Departments of Natural Resources, Assessments and Taxation, State, Planning, Economic Development, Agriculture, and the Governor's Office; a senator and a delegate; the State Soil Conservationist, and the chairman, who represented the University with its teaching, research, and extension arms.

During the course of our study and deliberations, we at the University arranged a series of seminars on Land-Use Planning. We covered a broad range of subjects, and we had participation from the Governor, who expressed strong interest in land planning in areas of critical State concern and an interest in planning for agricultural land; the Secretaries of the various State departments; the League of Women Voters; the Chamber of Commerce; County Planners, County Commissioners, and others. The proceedings of these seminars are being published by our Department of Agricultural and Resource Economics.

This spring, after months of study and discussion concerning plans for preserving agricultural land in other states and foreign countries, and after we had formulated some alternatives for preserving agricultural land which we thought might be useful in Maryland, we took the ideas to the people of the State in a series of regional meetings. We explained the alternatives and asked for discussion and reaction. The alternatives presented were:

1. Do nothing except continue the Maryland Farm Land Assessment Law which provides that land being farmed shall be assessed on the basis of agricultural use rather than on fair market value.

2. Provide for the formation of agricultural districts upon petition by groups of farmers. Agriculture would be the preferred use in

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Frank L. Bentz, Jr., Chairman of the Committee, is Vice President for Agricultural Affairs, University of Maryland, College Park.

such districts, and the districts would be set up for a period of 10 years.

3. Provide for the formation of agricultural districts as in number 2 and make it possible for farmers in the districts to sell easements to the State for keeping land in agriculture. The value of the easement would be the difference between fair market value and agricultural use value. In this case the duration of agricultural districts would be at least 20 years. The program would be financed by increasing the transfer tax on all land transfers in the State.

4. Provide for the formation of agricultural districts as in number 2 but, instead of easements, provide for an annual contract between the farmer and the State for keeping land in agriculture. The contract would be based on the average rental value of agricultural land.

5. Provide for the formation of designated agricultural districts with sale of easements to the State. The county legislative body, with the advice of an agricultural district advisory board, would determine the district boundaries.

6. Provide for a system of transferable development rights. Each acre of land in the county or planning district would receive a specified number of development rights. To develop an area designated for development on the county master plan, the developer would need to own the land and to have the required number of development rights. In order to obtain the rights he would buy from the owners of rights in areas of the county not planned for development. Once the development rights were sold, that property could not be developed.

The proposals were discussed in question and answer sessions at each of the regional meetings. At the close of each meeting a questionnaire was provided in order to determine the reaction to the various proposals. Ninety-one percent said that additional measures for preserving agricultural land in Maryland were necessary. Thirty-seven percent favored agricultural districts established by petition and set up for a 10-year duration. Thirty-five percent favored the idea of agricultural districts with sale of easements. Transferable development rights were preferred by twenty-one percent. Designated districts received only seven percent of the votes.

Let me present some of the specific reactions at the meetings:

1. We could usually count on having one farmer say, "We don't want any regulation whatsoever. We don't want any bureaucrat telling us what to do with our land."

2. We could also count on having an extreme environmentalist present who would want all land preserved for its value for wildlife and the environment--no development. He would usually plug zero population growth.

3. Young farmers would urge measures to conserve agricultural land for a long period of time and measures to keep the value of agricultural land at agricultural use prices.

4. Farmers about to retire would want to be able to sell their land without restriction.

5. City people who had bought a "farm" in the country (5 to 50 acres) would heavily favor measures to keep land in agriculture--keep neighbors out. They would also want to know how to make a profit on their farm!

6. County officials from some urban counties would want to see Maryland's Farm Land Assessment Law repealed because of abuse of it by speculators.

7. County planners' reaction was mixed. Some favored saving farm land. Others thought that it was unnecessary; more important to increase the tax base to pay for more public services for more development, for more people, more public services, etc.

Admittedly, I have listed many of the extreme viewpoints. In between the extremes are the viewpoints of the good solid urban citizens and forward-thinking farmers who recognize the importance of good land use and the necessity of planning for the future.

Our Committee took into account the results of our "opinion poll" and of statements presented at the meetings and in subsequent letters. After many additional meetings, we submitted our final report to the Secretary of Agriculture in August of this year. In it we recommended:

1. Continue the Maryland Farm Land Assessment Law as it now stands. It is effective in slowing the rate of transfer of land from agricultural to other use.

2. The concept of transferable development rights has merit, but is so complex that it is not likely to be accepted now. Our Committee set this alternative aside.

3. The Committee felt that the idea of agricultural districts with annual contracts for keeping land in agriculture sounded too much like a direct subsidy to farmers. We set this alternative aside.

4. The Committee felt that the designated agricultural districts idea would not be acceptable to the agricultural community. It was set aside.

5. The Committee felt that the idea of voluntary agricultural districts would not be sufficient to preserve agricultural land in the long run.

6. The Committee recommended the formation of agricultural districts with the opportunity for farmers to sell easements to the State.

7. The Committee recommended changes in federal and state estate tax laws to permit valuation on agricultural use value if kept in farming.

8. The Committee will probably recommend that approximately two million of the State's 6.4 million acres of land be kept in agricultural use. This figure includes the more productive lands of the State (U.S.D.A. classes I, II, and III).

Copies of the final report have been transmitted to the Governor, members of the Legislature, Extension offices, Farm Bureau and Grange officers, and others. The Secretary of Agriculture has asked the State Legislative Council to consider the report and react to it. If the reaction is favorable, legislation will be drafted for consideration in 1975. Another series of meetings on the general subject of land use is being planned this fall by the Maryland Extension Service. The recommendations of our Committee will be covered at these meetings.

My final points are these. The process of bringing about public action is slow. At least 2½ years will be involved before the work of our Committee can begin to have any effect. The second point would be that our clientele is no longer just the farm community but is, indeed, the entire community of our county, state, and nation.

THE PENNSYLVANIA GOVERNOR'S COMMITTEE FOR THE PRESERVATION OF AGRICULTURAL LAND

Amos Funk

I commend the committee that planned this meeting. I think there is a great need for those of us in the 12 northeastern states to get together to share our experiences and perhaps announce some of the plans we may have developed for giving some direction to land use in the Northeast.

If I may digress just a bit from my assigned topic, I would like to take a swing at the U.S.D.A.'s Economic Research Service and a release put out by them last year. This release stated that only 1.5% of U.S. land area is occupied by urban development. The inference was plain: there is no need to become concerned about the loss of prime agricultural land. It would have been more realistic if they would have used the percentage of cropland that is now in urban use. After all, cropland is where most of the development takes place.

The 1.5% is not very meaningful to those of you who live in Suffolk County, New York, where approximately 80% of the total land area is urbanized. It surely does not apply to New Jersey, where nearly 50% of the crop

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Amos Funk, member of the Committee, is farmer-vegetable grower and roadside market operator, Millersville, Pennsylvania.

and forest land is urbanized, or even in Lancaster County, Pennsylvania, where I live, where 22% of our total land area is now urbanized.

The E.R.S. figures are accurate but misleading and not at all helpful to those of us who feel the loss of prime agricultural land is a problem that needs solving. In fact, those groups opposing our point of view use E.R.S. figures to refute any numbers we may produce. Perhaps at the proper place and time Don Parlberg should be invited to explain the position of his department.

Now back to the preservation of agricultural land in Pennsylvania. The Committee based its report and recommendations on comprehensive research, a great many facts and opinions gathered by its seven subcommittees, and careful evaluation of facts and opinions presented in more than 250 written statements at 12 statewide hearings attended by more than 1,000 people, representing many segments of Pennsylvania society.

Farmers want a tax based on use and want to be able to sell at some future time without a penalty so severe that real estate transfer will be made too difficult. In other words, farmers want to have their cake and eat it too.

Public officials were worried about the tax base when "use values" for farm real estate were substituted for market values. Fortunately, only about 4 counties in the State would have encountered this problem in 1969. Even in these counties, preferential taxation of farm land would not have caused a major problem. Today urban pressures and reassessment would increase the number of counties affected to at least 8, and the reduction of tax receipts would be more significant.

Almost without exception attorneys wanted a 10-year rollback and stiff interest payments. They urged all possible precaution to prevent tax breaks for land speculators. The problem of enacting legislation that would encourage farmer participation and yet prevent land speculators from holding preferentially taxed land to be sold later for non-farm use is one few states have solved.

Environmental groups want the open space and the aesthetics provided by open space but are not too concerned about providing incentives to encourage farmers to continue farming.

Planners almost without exception endorsed the concept of the preservation of agricultural land. They pointed out that it would be the most effective tool for giving some direction to growth in an urbanizing area, and it would at least slow down urban sprawl and strip development.

Fol[illegible] is a summary of the recommendations made at 12 public hearings in [illegible]vania.

Recommendations Mentioned Frequently

By individuals -

1. Protect the individual's rights to land ownership - landowner should have the "right" to do what he wants with the land as long as he doesn't hurt his neighbors.

2. Landowners should have a say in how the community is planned.

3. Planning should be done on a local level; any zoning should be done at the local level voluntarily.

4. Eminent domain is misused.

5. Tax relief - taxes based on use.

6. Develop existing State-owned lands first.

By organizations -

1. Complete the Soil Survey - use as a guide for locating non-agricultural uses of land - keep as much agriculture in Class I and II as possible.

2. Planning should be done at the local level, coordinated with regional and State plans - "We need a State plan."

3. County comprehensive plans should be completed for each county - these plans should be used as a basis for the State plan - agencies desiring to install works of improvements should be guided by the county plan and get approval of elected county officials before final plans are completed and land acquired - more State funds for professional staff - professional staff in rural areas should be natural resource oriented, not out of a city.

4. Conservation education and information necessary.

5. Landowner should be able to voluntarily restrict the use of his land to agriculture with various incentives necessary.

6. Tax relief - taxes based on use.

7. Stricter enforcement of existing laws, especially water, sewage, and strip mine.

8. Ecological approach to planning - green belts, cluster development, "new cities", watersheds.

9. Development of existing State-owned lands instead of acquiring new land.

Various Other Recommendations Mentioned

1. "Agriculture Land Review Board" - some continuation of the committee's activities.

2. Acquisition of development rights; State or local government or association of local farmers.

3. License farmers to make a farmer prove he is a farmer.

4. Keep State-owned agricultural land in agricultural use.

5. Revise inheritance tax laws to prevent disposal of farms.

6. Farmers should get an assessment-free lien when "services" are installed on agricultural property not for the benefit of the agricultural enterprise.

7. Individuals and organized groups should be able to submit alternate plans for new public works projects.

8. Governor should mandate that State agencies use the Soil Surveys that are completed in selecting any land for use in a public works project and show that an alternative location on less desirable agricultural land areas is not available when it is contemplated to use good agricultural land.

9. Development should be encouraged on marginal lands, since this will preserve the existing tax base on good agricultural land and encourage an increase in the tax base on marginal lands.

10. Increase the in-lieu-of-tax rate of 20¢ per acre to the point that private lands contribute taxes to the local taxing units of government.

11. Defer tax on new capital improvements for 5 years.

12. Tax relief - assessment based on land use with roll-back feature for specified period of time or no roll-back, or capital gains tax, or transfer tax in lieu of roll-back.

13. Small user fees for use of State's recreational facilities and services.

14. Revolving Capital Fund Land Bank.

15. More multiple use of land on private and public lands.

16. Fees paid to private landowners for providing recreation.

17. State acquisition of unsightly areas (strip mines) to be reclaimed and used for State recreation lands.

18. Consolidation of the State's conservation agencies for coordination of programs.

19. Agricultural representation on agencies whose policies have an effect on private landowners' use of land - State Planning Board, Game Commission, Fish Commission, Highway Commission, county and township planning commissions.

20. Small agricultural areas should be preserved for historical significance.

21. State should set aside land for agriculture.

22. Urban development should be confined to those areas where services are provided or are planned within 5 years.

23. Utilities should be encouraged to use the same right-of-ways.

24. Acquiring agencies should use easements instead of fee simple.

25. Farmers' income should be increased.

26. Land-use plans should include those measures necessary for conserving soil, water, and our other natural resources.

27. State should have a psychologist available to help people with their relocation problems when eminent domain is used.

28. Farmers should be able to get more than the $5000 above market value currently available for relocation expenses.

29. Accelerate tree planting on abandoned farm lands.

30. Farmers should be eligible for Pennsylvania Industrial Development Authority funds for capital improvements.

31. Hardwood tree species regeneration research needed.

32. Total population should be expected to share in cost of keeping land in agriculture.

33. Survey to show where land is going.

34. Put low income people to work developing State lands.

35. Liaison with and approval of State Department of Agriculture on all agencies having an effect on the use of privately owned lands.

36. Additional technical, financial, and marketing assistance in order to improve farmers' income.

37. Stop the cloud seeding so that existing farms can raise a crop.

38. "Headwater" control of water instead of big dams should be encouraged.

39. Government should be more responsive to the wishes of the people; town meetings or public hearings should be utilized to a greater extent.

40. Zoning to prevent pollution.

41. Committee of landowners in each community to recommend ideas on multiple use of land, such as the removing of "No Trespassing" signs.

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INFLUENCING STATE AND LOCAL RURAL LAND-USE POLICY DECISION-MAKING: A CITIZEN'S EXPERIENCE

Carole C. Larsen

My experiences have largely been group experiences: first with the League of Women Voters, locally and on a state level, and second with forming a Coalition for Land Use Education (CLUE) in Frederick County, Maryland. Since I want to go into detail about the Coalition, because I think it is unique and exciting, I'll try to be brief and general about the League in the hope you are familiar with it.

The League is a voluntary association with constraints on individual time and money. Study of an issue is done by committees of ordinary individuals, first for our own benefit--to get the facts from as many varied and unbiased sources as we can find, by asking questions, observing meetings, attending workshops, reading reports, etc.--to use as a basis for discussion groups at the local level, where members give their opinions on the issue. When the League of Women Voters says it believes thus and so, it's called consensus because we only speak to those parts of an issue on which we are in general agreement. Study precedes action. It is grassroots organization.

A study takes at least two years. Depending on your point of view that is good or bad. Politicians respect the organization for being thorough and objective. One state legislator told me that if he wants to hear from the middle of the road after hearing from zealots on both sides, he listens to what the League is saying. On land use in Maryland, we're still studying. This makes some legislators impatient, but we can't rush our members. They see how complex this subject is, because they are having to contribute to the survey of literature and organization of material.

Another point about the League and the general public is that land use is not our only interest. There is a certain perspective gained by this which should be a caution to those who want to reach the public and for whom land use is the only interest.

The League of Women Voters, U.S., has been studying land use for more than two years. We have long-standing positions on quality of environment and on human rights, between which we are trying for balance in land use. We started with a focus on the responsibilities and relationships of the various levels of government in land-use decision-making. We're now looking at the public good and private rights.

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Most of you are professionally involved in land use in some capacity. The League has undoubtedly used you as a resource. Let me urge you to see the League as a resource; a resource of informed, articulate volunteers who know a lot about how government works and how to hold public discussion of issues; a resource for translating professional reports and administrative process into what the citizen wants to know; a channel of communication or feedback on how the public feels about an issue.

You are all aware that other groups like the Farm Bureau are also studying land use. I am going to focus now on what happened in Frederick County when the League and the Farm Bureau, who were not accustomed to talking to <u>each other</u>, let alone to the same audiences, got together, with the Community and Resource Development arm of the Extension Service acting as a catalyst, to share our research efforts on land use with each other. The Farm Bureau chairman expressed the feeling of his group that they had talked to farmers long enough about saving agricultural lands. It was time to talk to non-farmers. We Leaguers felt we were beginning to identify key issues in land use and that saving agricultural lands was one of them. The C & RD staff had the adult education expertise, an office, neutrality, and, as it turned out, grantsmanship.

Land use had become a popular topic in the County because of proposed bills in the State Legislature to increase State control over land use and the resultant reaction by local government; because of the large proportion of the County involved in some way in the agricultural industry; because we are the next domino in line for the development pressures of the District of Columbia and Baltimore. The newspapers had been giving increasing coverage to the subject, especially to local planning and zoning decisions.

We identified about 50 community leaders, people who had spoken out on land use either through civic associations, at public hearings, in Letters to the Editor, in special-interest groups like Historic Preservation, or who were leaders in economic sectors of the community directly related to land use, such as realtors, businessmen, and farmers. If these outspoken individuals could be convinced to join us in educating the public on land-use issues, we would have more success in our efforts than if they were all adding to the confusion by fighting each other. In January of 1974 we invited them all to a meeting to discuss the possibility of forming a coalition for the purpose of education. Almost all of them came--developers, civic activists, conservation and zoning lawyers--in short, people who had seldom said civil words to each other about land use, much less worked together. We succeeded in convincing those assembled that although our opinions on land use differed, it was in the best interest of each point of view not to get too far ahead of the general public's understanding of land use. It was agreed that citizen involvement in public affairs decision-making could be increased through educating them on the issues. Those assembled agreed to actively participate in and support a program of public education in land use. We would assemble information and educate ourselves by interaction as we shared our points of view, and eventually would present facts and a broad spectrum of opinions on land use to the public. We expected to likewise educate the decision-makers in the County and in Annapolis. The only qualifications for membership in the group were a willingness to play an active role in research, writing,

speaking, or evaluation, and a high degree of openness to the opinions of others. We agreed to be a coalition for the purposes of education and to take no position on land-use issues so that members would not feel restricted in any way from expressing their viewpoint in action outside the group.

In an effort to get an overall view of land use, we presented it as an iceberg, with "saving agricultural lands" as the tip because the Farm Bureau already had a position on that ready to present. Lurking beneath the surface was growth vs. no-growth, public vs. private rights, freedom to move and settle, economic vs. aesthetic values, at what level controls?, etc. I might add that in trying to focus on only the tip at first, we failed, and ended up discussing the whole iceberg of land-use issues at each meeting. We also discovered that in sharing our viewpoints with each other, we were not so far apart as we had expected. We discovered that there were gaps in our own knowledge of land use that needed to be filled in before we could bring an educational program to the public. Some of the members wrote research papers, some opinion papers. These have turned out to be a valuable tool for us and for the public. They have been put out on racks in the County office buildings and disappear like hotcakes. Approximately 5000 copies of CLUE publications have been distributed so far. I have brought two of them for you to have, as samples of the kind of self-generated research produced and the attempts at sharing knowledge we are making.

We scheduled what has developed into a series of forums, open to the public, where facts could be presented and opinions expressed. In all, 200 different people have attended. The first forum was on the State land-use bill then being debated in the Legislature. The second was a discussion of local land-use decision-making from the standpoint of the County Planning Commission. There had been considerable discussion about CLUE's relationship to the County decision-makers. A feeling of us vs. them prevailed. This program was a reaction to that adversary feeling--to explore why we felt that way and to see if they also had a story to tell. The meeting was moderated by a farmer who had some misgivings about containing the possible battle between civic association activists and the zoning lawyer and the Commission. Everyone grew that night: the farmer in confidence in his leadership of non-farmers, the antagonists by being polite to each other, and the group and the Commission by really listening to each other as human beings. We've had a forum on the "taking" issue by a young lawyer member, a debate between the zoning lawyer and a young banker about the merits of a capital improvements program budget as a planning tool. The availability of water for present and future development became an issue and was discussed in a two-session forum. Most recently, we had a panel of members talking about the problem of providing for low and moderate income housing in the County. All these programs were produced and moderated by different members. By this time we were well into the primary election race, and a lot of the serious candidates for local office were coming to forums regularly. (Of course, several were members who had decided to run.) Certainly, they used discussion time to campaign, but they learned something about land use.

We tried to get an overview of land use worked up into a slide program for the speaker's bureau to take to public groups. This is yet to be accomplished. Speakers have gone out and found that audiences don't think in broad overview terms. They want to hear about their land and their section

of the County. Our success has come from timing forums and papers according to issues that are of immediate news and concern. We have not yet developed a way to gather the larger public's opinions on land-use issues. We've had excellent press coverage (a couple of reporters are members) which has had tremendous educational reach in the County. This, together with candidates' debates, has made land use a topic of general public concern. We hope that whoever is elected will be better informed about land use because of us and that the public will know better than to expect easy answers and simple solutions.

At least the 25 community leaders who have stuck with the project, and who get around a lot, know a whole lot more about land use than they did ten months ago, and in the process they have voluntarily committed themselves to an educational approach to public affairs. We hope eventually to see better land-use decisions being made locally and at the State level, and we hope we will have increased the effectiveness of citizen involvement in land-use decisions through education.

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INFLUENCING OPEN LAND DECISIONS AT THE LOCAL GOVERNMENT LEVEL; MUNICIPAL CONSERVATION COMMISSIONS IN MASSACHUSETTS.

Mrs. Helen White

Influencing open land decisions at the local government level is an interesting and most important subject, for, as our young people would say: "That's where it's at". And that is, I believe, where it should be. For regardless of all the grandiose plans that may be made for the wise use of land, from whatever source - local, state, federal, or private - very little will be accomplished unless the people want it; and if the people do, they will make their concerns known.

Most elected officials have one motivating factor in common: they wish to stay in office. To do this they must respond to the will of the voters. No matter how much pressure they may feel from the developer or from the business community, if the voter speaks, he exerts the most pressure. On no other level of government is this more vividly demonstrated than at the local municipal level. As the state and federal governments have grown, and consequently have lost touch with the people, the voter has reverted to the old Yankee tradition of Town Meeting, for this is the forum in which he can show his strength, as well as his frustrations, and even his wrath. To those of us who have long been involved in working through our local governments, this fact is borne out by the increasing numbers of citizens attending city council meetings, planning board hearings, etc. The voice of the people is being heard, the will of the people is being met, and we are even more convinced that whatever assets of our communities are to be saved will be saved here. The neighborhood civic group may want only to protect the interest of its members, but for whatever purpose, these are the groups who indirectly provide support for the protection of remaining open spaces and whose weight is felt in determining the future use of land.

The Municipal Conservation Commissions in the Commonwealth of Massachusetts evolved on the principle of local control and have been successful because of the premise that at the local level there is genuine interest in and specific knowledge of the value of a certain area. For instance, within the Commonwealth it is doubtful that those living in eastern Massachusetts really care whether or not the Berkshire Hills are protected. By the same token, those living in the western hill country or in the Connecticut River Valley are not unduly concerned about the future of the islands in Boston Harbor or the sand dunes of Cape Cod. Having spent most of my life in Massachusetts, I can safely say that there are many who are not even aware of the existence of the other.

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The battle to save the areas I have mentioned, while regional in scope, and finally won at the state level, was fought on the local level by the people directly involved, spearheaded by the Conservation Commissions. It is impossible for any state or federal agency to be aware of or provide protection for the small wetlands and green areas which are so vital to the well-being of a community. In a recent survey conducted by the Massachusetts Association of Conservation Commissions, 24% of those responding indicated that the Commission was the only agency controlling open space within the community. Undoubtedly, these are the rural areas that have, as yet, felt no need to plan for the pressures of development and are only now beginning to burgeon. When the time comes, and it will come - for western Massachusetts offers much in the way of leisure development - it will be recognized that the Conservation Commissions have led the way to some semblance of open-space planning. Unfortunately, little will be done until the developer is "knocking at the door". Then action will take place; hopefully, it will not be too late.

The Municipal Conservation Commissions movement in Massachusetts was the catalyst for similar action by other Northeast states, and the enabling legislation unleashed a powerful tool for land use and planning. The collective accomplishments of the Commissions deserve recognition; their methods and ideas merit attention. But most of all, the Commissions should be brought up to their full potential. In a few short years they have served as the environmental conscience of the community and have brought pressure to bear at the local level to protect wetlands and areas of natural beauty.

The accomplishments of the Conservation Commissions have been against great odds. Tagged from the beginning as stoppers of all progress - the "nut" bunch, the butterfly chasers - the connotation lingers on but I, for one, do not resent being called "a swamp rat", especially when my city council has just unanimously voted to acquire a sixteen-acre Kettle Hole. Most commissions have overcome this attitude or overlooked it, and now they wield a real political punch within their communities. Working with and through their local elected officials, the Commissions have acquired 116,000 acres with the assistance of the State Department of Natural Resources "Self-help" program. It may be safely estimated that by gift, outright purchase, and easement, this figure can be doubled. Much of the land acquisition has been accomplished in the 14 years since the Commonwealth initiated this 50% reimbursement program. It was a real boost for the conservation movement. Municipalities heretofore uninterested in accepting the enabling legislation and creating a Conservation Commission suddenly heard the jingle of state money and reacted; of 351 municipalities in Massachusetts, over 320 have Conservation Commissions. The "Self-help" program also tied the Commissions directly to a State agency, adding some prestige in the eyes of local officials.

In Springfield, realizing the need for growth, as well as protection within the City, the Commission has, of necessity, set land acquisition goals. The proposed type of land to be set aside is that which protects the vital resources and the ecological balance of nature. Since the amount of land which should be devoted to conservation depends upon the inherent natural resource values, the majority of sites are located in the less developed areas where important resources have not been consumed by urban development.

The general goals are: preservation of wetlands, unique geological, biological, or historically significant areas, land which supports an abundance of wildlife, and land which provides access to rivers, lakes, and streams. In addition to satisfying one or more of these criteria, we would hope that land acquired for conservation would support educational objectives by providing outdoor laboratories for areas of study and resource conservation and, further, would provide opportunities for passive recreational use. Above all we would hope that land will be protected from detrimental private development. All of the areas - those acquired and those proposed for acquisition - are so designated in the Comprehensive Plan for the City.

Along with acquisition, the Commissions have been involved in all aspects of environmental protection, according to their ability and interests, energy and resources: floodplain zoning, wetland zoning, mass transportation, nuclear power, education, protection of wildlife, and on and on.

Of all the responsibilities given to Commissions, certainly the Wetlands Protection Act is the greatest. The responsibility of saving, or at least protecting, all the remaining wetlands within the state is overwhelming. Yet, a large number of Commissions have no professional help. If a Commission can use its city or town departments for advice, it may very well be confronted by employees with little or no training in sound environmental practices. Another frustration is the attitude often shown to a Commission by the professional. The developer looks at us as a threat to his God-given right to make a buck, and all too frequently his lawyer questions the Commission's right to subject his client to a hearing. After all, draining the run-off from a 35-acre parking lot through a small 31" pipe into a brook is not altering the brook; it's just improving the water quality! This attitude, although irritating, is understandable, for it is self-serving. But I am troubled by what appears so often to be the reluctance of those concerned with and schooled in land use to share their knowledge or even ask what help is needed. We can no longer afford the luxury of any special interests. We must use whatever means, whatever group, whatever legislation is available to accomplish the preservation of our remaining resources.

I did not wish to imply that the Conservation Commissions have been the "be all and end all" of the environmental battle. They are a valuable asset. Nor have I wanted to imply that all Commissioners wear white hats and that professionals and developers wear black hats. I have tried to be objective about the way it has been in my community.

Concerned elected officials, appointed officials, and lay people need and want the best possible information and practices available. They are the ones who, working together, can make it happen. After all, as Russell Train once said, "The environment is too valuable to entrust to the experts."

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RELATING DECISION AND CITIZEN INPUT ON TRANSPORTATION TO LAND-USE PLANNING

Malcolm F. Brenan

An aroused citizenry is demanding a part in decisions affecting their environment and social well-being. In response to these demands, new federal requirements have been thrust upon the transportation planner as he performs his studies concerning land use, economic development, and social issues.

This paper attempts to reveal what is taking place in the current transportation planning process as a result of these pressures, in an effort to promote research into improved methods to make the planning process more effective, especially in the areas of citizen participation and land-use analysis. The land-use-transportation relationship and the decision-making process concerning this relationship are reviewed. Then the citizens' part in this process is explained, and finally a few suggestions are offered on how the process might be improved.

A close examination of land-use activities and transportation systems reveals that they are interdependent and inseparable. A decision on one is bound to affect the other.

The fact is that transportation systems are major land users. In addition to the large amount of physical space they occupy, consider the wide variety of activities we engage in while using transportation facilities as a natural part of our daily lives. Transportation systems affect their immediate environment beyond the service they provide. They enhance some activities and inhibit others, forming both barriers and boundaries. When properly designed they can contribute to the use of their surroundings. When designed improperly they can cause deterioration of the environment and permanent damage.

While we must accept transportation facilities as legitimate land users and neighbors in our community, this is not their primary purpose. They exist to provide mobility, facilitate moving things and people from place to place. With the possible exception of recreational travel, it is at the ends of trips that we find the reason for or purpose of travel.

Land use generates travel. Practically all land use is dependent upon a certain amount of movement of people and goods in and out of a given area. Indeed, transportation planning is largely the study of trip-making from one place or zone to another.

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One of our planning problems has been that relatively more consideration has been given to planning physical facilities than to the trips which they serve or generate. Another problem has been the lack of coordination between land-use and transportation planning decisions.

Decisions on land use and transportation lead to the development and operation of transportation and land-use systems. These in turn cause certain types of land use (including transportation), which in turn result in various sets of social, economic, and environmental impacts. These impacts, along with various other external factors, result in modifications to land use and transportation systems, thereby presenting the decisionmaker with new problems and needs.

When land-use and transportation decisions are made and carried out independently, the systems and the social structure become very reactive. Objectives and programs come into conflict, the public is distressed, and government and private agencies begin to bicker at all levels.

On the other hand, where decisionmaking is coordinated, less disruption occurs and the public has more confidence in the systems and their governing processes.

There are three principal actors in this scenario: the public official, the planner, the citizen. The current theory is that if these people can be brought together with a more common understanding of land-use-transportation problems and solutions, a more amenable community can be developed in a more efficient manner.

The tools for this coordination and cooperation are now being formed. Legislation and resulting guidelines are being passed down from the federal and state levels, and detailed planning processes and procedures are being defined.

The environmental impact statement is a milestone in the planning process. In the field of transportation planning, the action plans developed by each state are attempts to integrate environmental considerations, a systematic interdisciplinary approach, and citizen involvement into the planning process. The objective of the process is to bring issues and tradeoffs to the attention of the decision-maker through the consideration of all viable alternatives and to provide the citizen with access to those officials who are responsible and accountable for conducting land-use and transportation programs.

Appropriate rules and regulations will be needed to support this process and assure proper coordination between functional plans and the various levels of government involved. It is submitted that land use should be the focus of this effort.

The basis for decision-making needs to be fundamentally clear to all parties involved. This calls for a deliberate selection of evaluation criteria based on specified goals and objectives. This, in turn, will help to assure that decisions are sound, timely, and in the public interest. To improve this process, periodic reviews and revisions should be made.

In recent years, citizens have effectively challenged projects and developments which they felt were not in their interest. The environmental impact statement and the public hearing process have become their principal tools. State and federal agencies are now apprehensive about moving ahead with controversial projects for fear of court action and the resulting waste of time and effort.

In response to this, state and federal agencies are attempting to get early involvement by citizens in the planning process. In this way they either gain acceptance by the citizens or become aware of an impasse during the early stages of plan development - before there is a large commitment of resources.

In many agencies, citizen participation is becoming a formalized part of the process and organization. Various techniques for citizen participation are being tried and adopted. At this point, there are about as many outstanding successes as there are failures. We still have a long way to go. The review of the decision-making process mentioned earlier could certainly focus on this area with great benefit.

In the long run it is doubtful if the role of the citizen in the planning process will ever be completely clear. There are too many variables and obstacles to the development of an ideal process:

1. citizens lack the necessary resources;
2. values change too rapidly;
3. population shifts;
4. plans may be too complex to comprehend;
5. citizens lack interest in large systems and long-range plans;
6. citizen participation may consume too much time and money;
7. citizens may become co-opted.

Overcoming or mitigating these obstacles is a real challenge to both the practitioner and the researcher.

In closing, I would like to offer some ideas on areas in which the land-use transportation planning process needs further development. First of all, we need to firm up on the planning process itself. In past years it has taken many shapes and forms at different times and places. I find much confusion about what the planning process is and who has responsibility for the various functions.

This leads to my second thought concerning the roles of the various actors in the process. I believe the degrees of involvement and interaction between citizens, planners, and officials need to be investigated and desirable guidelines laid out.

Another pressing need is the establishment of shared data bases for all land-use-transportation planning studies, including data base management and information systems that are open to the public.

In coordination with the development of the data base is the need to develop techniques for indexing and measuring social, economic, and environmental effects. Until these measures can be found and adopted, our evaluations will tend to be subjective, and it will be difficult to challenge or defend decisions.

Research has contributed significantly to the planning process. In fact, planning and research are inherently very closely related. Planning continues to invent the tools it needs as part of the process. The current efforts in statewide transportation planning are a good example of this dual effort. The American Association of State Highway and Transportation Officials and the Transportation Research Board have been leading the way in land-use-transportation planning research for many years, with encouragement from, and some independent effort by, the United States Department of Transportation. Planners have been very articulate in indicating their needs to these organizations, and the organizations in turn have been quite responsive.

I believe what we may need at this point is a general review of current research efforts concerning land-use planning to identify short- and long-range objectives, including a coordination with research efforts in related fields, such as water resource development, energy, and health.

I believe we have the management skills and techniques to carry on an effective land-use-transportation planning process at all levels of government. What we don't have is the legislation and funds to properly support these planning efforts. Legislation should provide flexible programs with objectives responsive to our needs. Funds must be made available on a continuing basis. We also need a review process to assure proper expenditure of these funds. Above all, programs should allow local planners, officials, and citizens to deal with their problems where they occur.

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FEDERAL ROLE IN LOCAL LAND USE DECISION-MAKING

Cheryl E. Wasserman

Next to energy, land use is perhaps the hottest item of debate on the national agenda. Certainly I could quickly put the question of the federal role in land use to rest by stating that it is a consistent policy of the Administrator of the Environmental Protection Agency, and his counterparts in the other federal agencies, that land-use decisions should and must be made at the state and local level. However, it is increasingly apparent that the federal government has a tremendous impact upon land-use development at local levels through its actions and policies.

While I am prepared to discuss with you the role of the federal government in general, I think that active consideration of land-use issues and recent actions by EPA would be of great interest to you, and I will address my initial remarks to EPA and environmental concerns.

I am certain that in the preceeding days of the conference you have discussed at length traditional and new land-use and growth planning and control techniques. Environmental standards and programs, however, play an interesting and unique role in this context. While they do not "determine" land-use patterns and plans in and of themselves, they offer new constraints and ground rules for land-use decisions, cause re-evaluation of local plans developed without consideration of the environment, and offer new stimuli and mechanisms within which we can address conflicting demands on the use of land in an open forum. It is in fact competing uses of land and alternatives for managing those uses which is the basis for our addressing land-use problems at this conference and which relate questions of land use to environmental quality.

Many of the programs I am about to describe represent opportunities as well as constraints. We usually associate "constraint" with regulation.

The emerging environmental programs are opportunities. However, because they are new programs and the potential for input from you is great, because the attention of the nation to environmental problems is shifting from an urban-area focus to a new examination of rural environments, from clean-up to prevention, and because many of the actions that are being taken to clean up polluted areas and positively plan for necessary development are also complementary to steps that need to be taken to preserve agricultural lands, the character of rural communities, and development of depressed rural economies.

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EPA is responsible for carrying out six major areas of legislation: the Clean Air Act, Federal Water Pollution Control Act, Noise Control Act, Federal Insecticide, Fungicide and Rodenticide Act, solid waste management, and radiation control. In talking to the land-use issue, however, the issues merge. You cannot separate air, water, and land. To aid in our agency's effort to work closely with state and local officials and interest groups in order to introduce environmental considerations into land-use decisions, to support efforts which would further environmental goals, and to fully address the implications and impact of our programs for future land-use choices for state and local areas, the Administrator is augmenting his staff and creating a small land-use office.

I would like to review our experience in implementing the major pieces of EPA legislation.

The Clean Air Act calls for the use of land-use and transportation controls where necessary to achieve national pollutant standards. Four land-use related programs are now required of states by EPA in response to this need. They are:

(1) transportation control plans;
(2) air quality maintenance planning;
(3) indirect source review;
(4) significant deterioration of air quality.

Transportation controls have been necessary in some 38 of the nation's largest metropolitan areas. While many of the measures taken under the concept of transportation control do not relate to land use, inspection maintenance programs for cars, for example, do. Some 12 or 14 cities require significant augmentation of mass transit and important reductions in vehicle miles of travel. In these areas automobile and stationary source emission controls were not sufficient to achieve levels acceptable to protect public health without such measures.

The spatial arrangement of land use affects our dependence on the automobile and the potential for alternative, less polluting modes of travel. Some development patterns servicing the same population have been found to reduce vehicle miles by up to 30%. It is clear that transportation plan alternatives, consistent with meeting air quality standards, are intimately related to patterns of land use, especially in these 38 cities. Many people in the past have voiced the opinion that alternative land-use patterns are really long-term measures and therefore are of lesser importance in meeting public health standards. We are no longer restricted to short time horizons. EPA and the states must now address long term air quality measures.

In response to a lawsuit initiated by the National Resources Defense Council, EPA has shifted program emphasis from solely attaining air quality standards to maintaining standards over a longer time frame than the initial 1975 and 1977 Clean Air Act deadlines. EPA and the states will now supplement attainment measures and the preconstruction review of new major stationary sources with two actions, both relating to land-use planning and control. First, the states and EPA are now in the process of reviewing area growth projections and related air quality trends. They will then designate air quality maintenance areas and assure that area land-use and transportation plans are made compatible with air quality standards, and/or develop

additional control measures necessary to assure that standards will not be exceeded over 10-year intervals. The air quality maintenance planning process is heavily dependent upon the adequacy of land-use and transportation planning and places heavy emphasis upon public participation.

EPA's other response to the NRDC suit was to require that, starting January 1, 1975, new indirect sources of air pollution would be reviewed for consistency with areawide implementation plans and the localized carbon monoxide pollutant standard. Indirect sources are developments such as highways, airports, commercial and residential office space, municipal parking lots, etc., which attract mobile source activity. We expect these reviews to result in changes in facility design configurations, to reduce or facilitate traffic flow, lead to more appropriate siting, and offer increased potential for mass transit where it is needed.

In the preamble to the indirect source regulations EPA highlighted the relationship of these regulations to sound principles of land-use planning and encouraged these reviews to be incorporated into existing development control programs at all levels of government.

The Sierra Club also won a court case which concluded that EPA had not fulfilled all of its program responsibilities. We had not required states to establish approvable programs to prevent significant deterioration of air quality. This applies to areas where the air is cleaner than levels required by EPA national standards.

EPA will soon promulgate final regulations on significant deterioration. I feel that the approach being pursued in the Agency will have far-reaching impacts in promoting sound growth policy development in the states. It was clear that the concept of what constitutes "significant" deterioration below the national standards varies according to the area affected. Deterioration in wilderness areas, agricultural areas, and national and state parks is significant at much lower levels than deterioration in rapidly urbanizing areas. To allow for maximum state flexibility and discretion in assessing the air quality implications of major new sources of sulfur dioxide and particulates, the regulations establish a national procedural framework within which the states would act. Following public hearings, each state would classify its area into any of three categories:

(1) a preservation area, in which very limited growth in emissions would be allowed;

(2) a moderate growth area, in which modest increases in emissions could occur (e.g., a typical 1000 megawatt coal-fired plant);

(3) a limited-use intensive-growth area, in which emissions would be allowed to deteriorate air quality up to the national standards.

This process in classifying areas will require open land-use planning in a public forum. It will force state decisions regarding preferable areas for concentrated future development as well as areas in which air quality is to be preserved into the future.

Implementation of the Federal Water Pollution Control Act has also required land-use planning and control. EPA issues grants for the construction of wastewater treatment facilities to accommodate existing and projected growth in communities. These grants can serve as self-fulfilling prophecies of staggering growth rates in suburban communities or, if denied or conditioned, can restrain, prohibit, or redirect growth.

The environmental consequences of providing new access to municipal sewers depend upon adequate land-use planning and control of new growth.

It is not enough to construct wastewater treatment facilities. Sewer capacity or other disposal options must be continually reviewed for compatability with community land-use planning. The Act provides EPA, or an approved state permit program, with an enforcement mechanism in response to violations of municipal treatment plant permit requirements due to overloaded or poorly operating facilities. A court-imposed limitation or restriction in new sewer hook-ups can be requested.

The term "sewer ban" strikes fear in the hearts of developers, planners, citizens, and special interests alike. The fact that we must resort to the use of sewer bans is the clearest indicator I can cite that technology alone is not sufficient for protecting water quality. Many communities do not coordinate zoning and building permit issuance with sewer capacity. The Blue Plains treatment plant has a building permit backlog of 16.5 million gallons per day. These permits were issued long after the plant was dumping raw sewage into the Potomac. Meanwhile, the Ramapo Township plan linking new development to a long-range sewer plan for the community is hailed as a new concept.

Sewer bans have been increasingly evoked around the country. Often they do not represent any sudden response to protecting the environment but rather an effort to limit continued high rates of population growth or exclude certain economic and racial groups.

It is clearly EPA's position that federal municipal permit enforcement will not dictate the ability of local communities to grow nor do we promote the use of sewer bans for exclusion. The Agency will enforce permits but will also promote a change in the way communities prepare for growth. This will be accomplished through selective planning and management requirements for near overloaded facilities. If the sewer capacity planning process can be made sufficiently overt and attuned to regional as well as local interests, I think we will serve a multitude of societal goals.

The Water Act promotes the importance of regional planning for adequate sewer capacity, protection of water-related resources, and control over the location and nature of point and non-point sources of pollution. This is accomplished through areawide waste management planning grants. Similar to air quality maintenance, areas are now being designated which, because of urban industrial concentrations or other complex control problems, require comprehensive environmental planning and control. The Act specifically mentions the use of land-use controls. Areawide management plans will take a twenty-year perspective on growth in municipal and industrial wastewater loads--what I mean here is direct or point dischargers. Non-point pollution sources, representing on the average approximately 40% of the total pollutant loadings, especially require the use of sound land-use location

decisions and land management techniques. This will affect, for example, floodplain and wetlands development and agricultural practices. Advance planning for treatment plants and/or land disposal will also be critical.

Finally, EPA has developed guidelines for the development of regional solid waste management programs that are integrated with land-use planning. Acquisition and pre-selection of acceptable disposal sites is important. Work is also under way in the Agency to develop, in conjunction with the Department of Transportation and other federal agencies, noise guidelines for airport development. It seems that technology will not be sufficient to prevent incompatible uses and poorly insulated development around airports. Studies are currently under way to analyze these problems.

I believe these programs hold the promise of opening up closed avenues of decision-making to greater public participation and offer specific non-arbitrary criteria for land-use decision-making. However, it is essential that we develop comprehensive land-use decision-making processes for both planning and control so that all of the important social and economic goals of our rural communities can be realized.

Environmental programs play but one small role in this. We are trying to insure that it is a positive role.

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PART III

IMPLICATIONS OF CONFERENCE

FOR

LAND-USE RESEARCH AND EDUCATION

0263/264

RURAL LAND USE POLICY IN THE NORTHEAST: CONSENSUS, DIRECTIONS, AND ISSUES

W. Neill Schaller

This conference has done more than increase participant awareness of land-use problems. It has focused on problem-solving tools. In fact, several of you have commented that in no previous forum has such a wide range of alternative policies and control techniques been examined.

Challenges and risks are involved in moving from problem awareness to problem solving. I would like to talk about some of them, not to play down the progress made here but hopefully to add further perspective. My remarks deal with four questions: What is the problem? What can be done about it (the main question for this conference)? What are the implications for research and education? What is the role of the professional?

What is the Problem?

A wise choice of land-use policy tools obviously requires a correct diagnosis of the problem. Land-use problems occur because current or prospective use differs from desired use. Desired use implies certain ends or goals. Land-use policies and other tools are means to those ends. Thus, to diagnose the problem, we have to know something about the ends as well as reasons why they have not been achieved.

If all this seems a little academic, wait. Herbert Stein, writing about the Economic Summit in the Wall Street Journal on October 2, illustrates what can happen when the problem is not understood, or when different parties arrive at different diagnoses. He says that "... there were some people, at least, who had the hope of finding or raising a consensus behind an old idea, the idea of cutting the budget." But, Stein goes on, "... inflation did not come through clearly as the dominant problem. At the first meeting Professor Samuelson told President Ford that the nation's number one problem was not inflation but stagflation, and once that has been said the compulsion to 'face up' to budgetary restraint evaporates."

Surely you can think of similar examples from land-use policy. Early in the conference, Professor E.F. Roberts alluded to what I see as the extreme case, in which one even looks for ends to go with desired means.

A concern expressed here many times is that prime agricultural land is

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shifting out of farming. The question must be asked, are the alternative remedies discussed at this conference based on a good understanding of why this shift occurs? How much of the bidding of land out of farming is due to population pressures, to lower relative economic returns to land used for farming, to the tax structure, or to previous policies, including those never perceived as likely to affect land use? Have we identified the problem or the symptoms? Will the corrective measures chosen simply pile new policies on top of old ones? Should we unheap past policies to get at the basic reasons for the disappearance of farmland?

We can go only part way toward answering the question of what the problem is without facing up to the companion question, whose problem. The owners of land and those affected by its use may have entirely different ends. Marion Clawson reminded us that considerable non-urban land in the Northeast--farmland and what Clawson calls "not-land"--is owned by urban people who not only see things differently but will have much to say about rural land-use policy.

I suppose the vast majority of land-use problems are problems not merely because desired ends are unfulfilled, but because different ends are involved and available means cannot satisfy all of them. No doubt this helps to explain why we have different names for land-use problems. Some refer to a particular problem as an environmental quality problem. Others may label it a physical or economic problem. Who you are and where you sit determine whether you see a problem at all and, if so, how serious it seems. Whether you label as a serious problem the building of high-rise apartments on farmland depends on whether you are (or think like) the farmer, developer, renter, public official, or interested neighbor. If you are a public official in Washington, you will probably think about it quite differently than someone who resides elsewhere. Similarly, what the federal official describes as a land-use problem may appear to the local citizen as an issue too remote to add to his already-long list of worries. There is no one "correct" perspective.

What Can Be Done About It?

The question has two parts: What are the alternative policies and control techniques, and what is the process of deciding which tools to use?

Land-Use Policy Tools

The tools we have discussed here for solving land-use problems fall into a continuum between sole reliance on the marketplace and complete reliance on regulations and controls. Economists as a rule favor letting the market work. When the market fails to solve land-use problems, such as those caused by external effects, they turn reluctantly to controls. Planners, in contrast, tend to favor regulation, flirting now and then with the market approach.

Between the two extremes are incentives and other techniques to guide the changes in individual behavior that will solve land-use problems. Larry Libby spoke of these. The distinction between guiding and controlling is important. Guiding policies reward desired behavior. If

the individual chooses not to change his behavior, he loses only the reward. Controls penalize anyone who behaves undesirably. The individual can decide to disobey a law, but the resulting fine or jail sentence tends to remove that option as a viable choice.

We have talked a lot about both intended and unintended consequences or effects of alternative land-use policies. One obvious conclusion is that the effectiveness of a policy depends not only on correct diagnosis of the problem, but also on a favorable setting in which the policy can operate. I hear you saying that the agricultural districts approach in New York can encourage retention of prime farmland in agriculture when development is relatively scattered but may be less effective when urbanizing pressures mount. Clearly, a policy that is effective in one place may have limited effect in the same place five years later. It might never work in another location.

As Libby and others have emphasized, the combination of other policies on the books is an important part of the setting. Different policies can offset as well as complement each other. Our discussions have even hinted to me that land-use patterns may be influenced as much by policies having no perceived relation to land use as by those specifically concerned with land use.

The unintended effects of land-use policies are of continuing concern to all of us. In solving a particular land-use problem, we worry about creating or aggravating another problem. Some of you have pointed out the unintended benefits to higher income people of certain tax policies. Others have said that use-value assessment may provide a haven for speculators. It has also been suggested that if the property of farmers is taxed less, the tax burden will be shifted to non-farmers, which might ultimately increase the cost of housing for low-income people.

To this endless list of unintended effects I would add the possible impact of a given land-use policy on concentration of land ownership. If the public is seriously concerned about bigness, the question to be asked of each proposed policy is, will it encourage or discourage concentration?

If everything is indeed related to everything else, where does the assessment of intended and unintended policy effects end? There is no answer. However, I see more examples of our not having gone far enough than evidence of trying to consider everything.

The "taking" issue has received justifiable attention here, but I wonder if the issue is not broader than the taking of property rights, the issue we have emphasized. Are we not struggling here with the more complex problem of who is going to take what from whom? I suggest that land-use policies and control techniques may well involve the taking not only of property rights, but of other critical rights, such as access to choice, opportunity, prestige, or income.

The Process of Selecting Policy Tools

We have talked more about tools than about the process of selecting tools. Yet to many people the question of who decides, and how, is as important as which tool is chosen. The issue is not whether the public should

participate, but how much, when, and how. Still, those who want to find solutions quickly are apt to view public involvement as time-consuming and costly. They may encourage it, not for its own sake, but rather to legitimize a particular decision. Do we think of public involvement as a means to ensure acceptance of a policy decision when the public sees it as an end? Perhaps we should begin to think of anything that restricts public participation as the potential taking of a right.

Related to the matter of who decides is the important question, at what geographic or governmental level will what decisions be made? Marion Clawson sees a shift upward in the locus of control. What would be the consequences of this shift? Is it what the public wants? Although we have not addressed this matter directly, in my judgment it is a major land-use policy in its own right. A possible way to resolve it is suggested in the so-called "public choice" approach to public administration.[1] New institutional arrangements, or rules of the game, may be devised to encourage governmental units at different levels to negotiate with each other or otherwise participate in decision making, much as private firms participate in markets. The public choice approach then poses the challenging question, who decides on the rule changes and how?

What Are the Implications for Research and Education?

Virtually every session in this conference has carried the implied message that informed land-use policy decisions require facts and knowledge. However, we have talked very little about specific data and research needs.

Different kinds of research are required at different stages in what can be called the "policy issue cycle." As a land-use problem emerges, we need to know why it is a problem and for whom. We need to know what people really want. As alternative policy tools and control techniques are identified, we need to be able to make informed judgments about the effects of those alternatives. More often than not, the kind of research required is "what if" research, which must rely as much on informed judgment as on hard data. The social scientist cannot ignore this challenge by saying that, unlike the physical scientist, he has no control laboratory, or by deferring his investigation until he has actual data to analyze.

Still another kind of research is needed at the point in the policy issue cycle where decisions are made. We need knowledge about alternative decision-making rules and their consequences, just as we want to know about the effects of alternative tools. Here I would include research on alternative ways to increase the extent and effectiveness of public involvement, such as compensating citizens for the costs they must bear in order to participate. Further questions are implied in the distinction made by Ronald Pedersen between legislative and administrative decisions. If the really important decisions are made by those who administer legislation, and if public involvement ends when legislation is enacted, does that mean that more decisions should be legislated, or does it point to the need for new accountability rules? Should ways be found to expand post-legislative involvement of citizens?

The role of research does not end once a policy or control technique is adopted. Performance should be monitored and evaluated if only to

determine whether the problem the corrective measure was supposed to solve has in fact been solved. If the problem persists, research may be required to determine why. Not all of these issues are "researchable", but I think you determine that only after asking the relevant questions.

Just as research needs differ at various stages in the policy issue cycle, so do the contributions to be made by extension education. In the initial stages of the issue cycle, the need is for education to increase public awareness of the problem and then to help identify the alternatives and consequences of problem-solving tools. Extension can play an important role in broadening citizen participation in decision-making and ultimately monitoring the results of actions taken.

As Dave Allee and others have said, it is "tough" to do useful extension education when the issues are as complex and controversial as most land-use issues. But if extension educators merely raise the quality of the policy debate, they will have made a significant contribution.

What Is the Role of the Professional?

I feel that this question belongs, even though we have not considered it directly. It matters how you think about and carry out your respective roles for two main reasons.

First, it is people, not land, who have land-use problems. Conferences may deal with real estate, food production, and scenery, but what we are really talking about, and often tinkering with when we go home, is the well-being of people. The solution to a land-use problem may be what you and I term, clinically, a trade-off, but to the people affected it may be a blessing or a tragedy.

Whatever role you play in land-use problem solving - planner, administrator, educator, or legislator - you are not a detached technician, but a part of a process. This applies to researchers, too. If you doubt me, think about Larry Libby's closing remark that ". . . timely policy research can itself be an effective incentive for guiding land-use behavior." It follows, I think, that you have what can only be called a moral responsibility to use your judgment and talents with humility.

Second, lack of public confidence in professionals, as well as government, adds particular importance to how you think about and carry out your role. Even the confidence once placed in lawyers has been tarnished by Watergate. Nor is the climate improved by the professional's occasional lack of confidence in other professionals. It may seem unnecessary to say so, but never underestimate what you can do to help restore confidence.

How you respond to four professional pitfalls could have a significant impact on the well-being of people and their confidence in you. Here I am talking mainly to professionals in the public service.

Role confusion is one pitfall. How do you see your role? Do local leaders, citizens, and other professionals see it as you do? If you are in extension education, for example, what must you do, or be, in order to teach? Do you have to mediate before you can teach? Do others recognize and accept that role? The payoff from trying to clarify your role and to

gain acceptance of it can be substantial.

A second pitfall is succumbing to grand designitis--looking for that one grand design or one best solution to a complex land-use problem. Unfortunately, progress is often made in small steps that are seldom neat and usually indirect.

The third pitfall is the favored client tendency. If you serve different involved publics who see a land-use problem differently, how do you proceed? To simplify matters, you may be tempted to look for policy means that will maximize the ends of one person or group without hurting others "too much." But there is a subtle difference between winning and not losing. Your publics will see it. Giving in to this temptation could also block understanding of the other ends involved and, as a result, reduce the chances of finding those rare, but not impossible, means that will satisfy all parties. A way out of this dilemma is to know how much of the problem-solving process is in your proper domain and how much belongs in the political arena.

Finally, the reality of self-interest suggests a related pitfall. Our discussions tell me that all of you are frustrated at times by the self-interest of parties involved in land-use debates. How often have you silently muttered, "People are no damned good?" How do you manage these situations?

Most professionals probably feel that helping to develop a new land-use "ethic" is either an unrealistic professional role or one best left to men of the cloth. If we are talking about the role of the professional as a person, I disagree. Regardless, there is an obvious professional role here. You have the opportunity, if not the obligation, to help individuals develop "enlightened" self-interest. There is indeed a difference between self-interest and enlightened self-interest. While some conflicts will surely remain even if self-interest is enlightened, the resolution of conflicts will be better informed. And that is no small accomplishment.

The opportunity to increase enlightenment applies as well to the self-interest of counties, states, and even nations. Northeast states are understandably interested in ensuring an adequate supply of food for themselves, but how enlightened is that self-interest? A high degree of food self-sufficiency in New Jersey would undoubtedly raise the price of food to consumers in the State, simply because New Jersey does not have a comparative advantage in the production of many foods. The point is not that self-sufficiency is wrong, but whether both the disadvantages and the advantages receive adequate attention. Wise decisions often grow out of seemingly unpopular thoughts.

This conference is a beginning, not an end. You are not leaving with a kit of ready-made tools. If the conference is useful, it will be because you have acquired new perspectives, new information, and ideas; not because you have answers, but because you are more certain that you know the right questions.

Reference

1. See Vincent and Elinor Ostrom. "Public Choice: A Different Approach to the Study of Public Administration," Public Administration Review, Vol. 31 (March-April 1971) 203-216; also, Robert Bish and Vincent Ostrom, Understanding Urban Government: Metropolitan Reform Reconsidered, (Washington, D. C.: American Enterprise Institute for Public Policy Research, 1973).

APPENDIXES

APPENDIX A

PROGRAM

CONFERENCE ON RURAL LAND-USE POLICY IN THE NORTHEAST
October 2-4, 1974 at
Sheraton-Deauville Hotel and Motor Inn, Atlantic City, New Jersey

Sponsored by Northeast Regional Center for Rural Development in cooperation with Northeast Public Policy Committee, Northeast Resource Economics Committee, and NE-90 Technical Regional Research Project Committee - all affiliated with the land-grant colleges and universities in the 12 Northeastern states.

WEDNESDAY, OCTOBER 2

Registration - starting at 10:00 a.m.

Session 1

12:00 noon-2:00 p.m. Luncheon session
Chairperson - Charles E. Hess, Dean, Cook College, Rutgers University
Welcome and Remarks - The Honorable Brendan T. Byrne, Governor of New Jersey
Introduced by the Honorable Phillip Alampi, Secretary, New Jersey Department of Agriculture
Conference Overview - Olaf F. Larson, Director, Northeast Regional Center for Rural Development
Problems and Policy Issues in Rural Land-Use Control - Marion Clawson, Acting President, Resources for the Future, Inc., Washington

Session 2

2:30-4:30 p.m. Alternative Major Land-Use Policies and Land-Use Control Techniques
Chairperson - Maynard C. Heckel, Director of Cooperative Extension Service and Associate Dean, College of Life Sciences and Agriculture, University of New Hampshire
The Use of Direct and Indirect Police Power for Land-Use Control - E. F. Roberts, Jr., Professor of Law, Law School, Cornell University
Influencing Land-Use Through Public Policies and Activities - Ronald W. Pedersen, First Deputy Commissioner, New York State Department of Environmental Conservation
Discussion

THURSDAY, OCTOBER 3

Session 3

9:00 a.m. - noon. Alternative Major Land-Use Policies and Land-Use Control Techniques (continued)
Chairperson - Gerald A. Donovan, Dean, College of Resource Development, University of Rhode Island
The Transfer of Development Rights - B. Budd Chavooshian, Cooperative Extension Specialist, Department of Environmental Resources, Cook College, Rutgers University
The Public Purchase of Development Easements - William L. Park, Chairman, Department of Agricultural Economics and Marketing, Cook College, Rutgers University
The Use of Tax Policies and Other Special Incentives - Lawrence W. Libby, Department of Agricultural Economics, Michigan State University (on leave with Resources for the Future, Inc., Washington)

Session 4 (Concurrent with Session 5)

2:00 p.m. - 4:30 p.m. Workshop - Experiences with the Use of Police Power as a Land-Use Control Technique
Chairpersons - John Van Zandt, Division of Rural Resources, New Jersey Department of Agriculture and Silas B. Weeks, Institute of Natural and Environmental Resources, University of New Hampshire

Part A

Vermont's land-use and development law (Act 250) -
An "inside" view - Schuyler Jackson, Chairman, Environmental Board, Vermont Agency of Environmental Conservation
An "outside" view - F. O. Sargent, Department of Resource Economics, University of Vermont
Adirondack Park Conservation and Development Plan (New York) - G. Gordon Davis, General Counsel, Adirondack Park Agency
Discussion

Part B

High impact zoning: Maine's Site Location of Development Act - J. Delphendahl, Department of Agricultural and Resource Economics, University of Maine at Orono
Delaware's Coastal Zone Act and other State and Federal coastal zone management legislation - David R. Keifer, Director, Delaware Office of State Planning
Flood plain zoning: A state response to the Federal Flood Disaster Protection Act of 1973 - David J. Allee, Department of Agricultural Economics, Cornell University
Wetland legislation: the Massachusetts case - J. H. Foster, Department of Food and Resource Economics, University of Massachusetts
Discussion

Session 5 (Concurrent with Session 4)

2:00 - 4:30 p.m. Workshop - Experiences with Tax and Special Incentive Policies as Land-Use Control Techniques
Chairperson - Robert F. Hutton, Assistant Director of Agricultural Experiment Station, Pennsylvania State University

Part A

Assessment policies and practices - Dale K. Colyer, Division of Resource Management, West Virginia University
Use value assessment: Connecticut's Public Act 490 and legislation of other Northeastern states - Irving F. Fellows, Department of Agricultural Economics, University of Connecticut
Discussion

Part B

Agricultural districts in New York - Howard E. Conklin, Department of Agricultural Economics, Cornell University
Capital gains tax: the Vermont case - William H. Bingham, The Extension Service, University of Vermont
Inheritance tax policy: implications for rural land-use - W. Fred Woods, Economic Research Service, U.S. Department of Agriculture
Discussion

FRIDAY, OCTOBER 4

Session 6 (Concurrent with Session 7)

9:00 a.m. - noon. Workshop - Experiences with Development Rights, Public Acquisition, and Easements as Land-Use Control Techniques
Chairperson - David J. Burns, Department of Agricultural Economics and Marketing, Rutgers University

Part A

The experience of the Blueprint Commission on the Future of New Jersey Agriculture - The Honorable Phillip Alampi, Secretary, New Jersey Department of Agriculture
The Tri-County Conservancy of the Brandywine - Thomas H. Pierce, Director of Land Management, Chadds Ford, Pennsylvania
The Ramapo (Rockland County, New York) experience - Charles L. Crangle, Senior Planner, New York State Office of Planning Services
Discussion

Part B

The Lincoln (Mass.) Land Conservation Trust and Rural Land Foundation, Inc. - Kenneth W. Bergen, Chairman of the Trustees, Rural Land Foundation

Land purchase and development easements in Suffolk County (New York) - John V. N. Klein, Suffolk County Executive

The Nature Conservancy programs in the Northeastern states - Bradford C. Northrup, Eastern Regional Director, The Nature Conservancy, Boston

Discussion

Session 7 (Concurrent with Session 6)

9:00 a.m. - noon. Workshop - Experiences with Influencing Public Agencies and the Legislative Process

Chairpersons - Donald J. White, Cooperative Extension, New York and George D. Wood, Cooperative Extension Service, Maryland

Part A

Panel: Citizen influence on rural land-use policies through the work of state commissions

Connecticut Governor's Commission on the Preservation of Agricultural Land - Donald A. Tuttle, Director, Connecticut Board of Agriculture

Maryland Committee on Preservation of Agricultural Land - Frank L. Bentz, Jr., Chairman of Committee and Vice-President for Agricultural Affairs, University of Maryland

Pennsylvania Governor's Committee for the Preservation of Agricultural Land - Amos Funk, Member of Committee, Millersville

Influencing local and state rural land-use policy decisions: A citizen's experience - Carole Larsen, Vice-Chairman, Citizens Coalition on Land-Use Education, Frederick County (Md.) and Chairman, Land-Use Committee, Maryland League of Women Voters

Discussion

Part B

Influencing open land decisions at the local government level: Municipal Conservation Commissions in Massachusetts - Mrs. Helen White, Chairman, Springfield (Mass.) Conservation Commission and Member, Board of Directors, Massachusetts Association of Conservation Commissions

Influencing a state agency: highway planning and land use - Malcolm F. Brenan, Director, Advanced Planning Division, West Virginia Department of Highways

A federal agency and local land use: the Environmental Protection Agency - Cheryl E. Wasserman, Land Use Policy, Office of Planning and Management, Environmental Protection Agency, Washington

Discussion

Session 8

12:00 noon - 2:00 p.m. Luncheon session

Chairperson - William E. McDaniel, Dean, College of Agricultural Sciences, University of Delaware

Rural Land-Use Policy in the Northeast: Consensus, Directions, and Issues - W. Neill Schaller, Associate Managing Director, Farm Foundation, Chicago

The Citizen, Government, and Rural Land Use Policy: A State Legislator's View - The Honorable Gerald T. Horton, Georgia House of Representatives and Co-Chairman, Council of State Governments' National Task Force on Land Use

2:00 p.m. Adjournment

APPENDIX B

LIST OF REGISTERED CONFERENCE PARTICIPANTS

John Adams
Catskill Study Commission
Stamford, N. Y.

Chris Ahrens
Office of Economic Opportunity
New York City

Earl Ainsworth
American Agriculturist
Ithaca, N. Y.

The Honorable Phillip Alampi
Secretary, New Jersey Dept. of Agriculture
Trenton, N. J.

Roger N. Allbee
Sea Grant Advisory Service
Brockport, N. Y.

David J. Allee
Cornell University
Ithaca, N. Y.

W. D. Anderson
Economic Research Service
U.S. Department of Agriculture
Washington, D.C.

Carol S. Applegate
Dey Road
Cranbury, N. J.

Warren Archey
Cooperative Extension Service
Pittsfield, Mass.

James E. Ashton
Cooperative Extension Service
Millbrook, N. Y.

John Balsam
Farmers Home Administration
Turnersville, N. J.

Jack L. Barrick
Soil Conservation Service
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Syracuse, N. Y.

Richard Barringer
Bureau of Public Lands
Department of Conservation
Augusta, Maine

Richard L. Barrows
University of Wisconsin
Madison, Wisconsin

John W. Bater
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Leland Beebe
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Glenmont, N. Y.

Chester F. Bellard
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Somerset, N. J.

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Hyattsville, Md.

Frank L. Bentz
University of Maryland
College Park, Md.

Kenneth W. Bergen
Bingham, Dana and Gould
Boston, Mass.

John W. Bergstrom
Pennsylvania State University
University Park, Pa.

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Rutland, Vt.

Richard N. Binetsky
Division of State and Regional Planning
Trenton, N. J.

Gordon B. Bishop
The Star-Ledger
Newark, N. J.

Ronald F. Bouffard
University of Vermont, Extension Service
Montpelier, Vt.

Derek Bradford
Rhode Island School of Design
Providence, R. I.

John T. Breakell
Connecticut Association of Conservation Districts, Inc.
Goshen, Ct.

Malcolm F. Brenan
Department of Highways
Charleston, W.V.

Joel Brown
University of Massachusetts
Canaan, Ct.

William R. Bryant
Cornell University
Ithaca, N. Y.

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Thomas H. Burbine
Cooperative Extension Service
Fonda, N. Y.

David J. Burns
Rutgers University
New Brunswick, N. J.

Governor Brendan T. Byrne
State of New Jersey
Trenton, N. J.

George E. Carle
Temporary State Commission on Tug Hill
Watertown, N. Y.

John E. Carroll
University of New Hampshire
Durham, N. H.

Dominick Cassetta, Jr.
Cape-Atlantic Soil Conservation District
Mays Landing, N. J.

B. Budd Chavooshian
Rutgers University
New Brunswick, N. J.

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John F. Damon
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Karl L. Davidson
Forest Service
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APPENDIX C

ABOUT THE CONFERENCE SPONSORS

Northeast Regional Center for Rural Development - The Center was established at the Cornell University Agricultural Experiment Station in February 1972 upon recommendation of the State Agricultural Experiment Station directors in the 12-state region. Its primary concerns were to be rural development research and the training of persons engaged in or preparing for work in the area of rural development. Since May 1974 the Center has also had responsibility for a regional program to support and complement the research and extension rural development pilot programs conducted in the several states through the land-grant institutions as required under Title V of the Rural Development Act of 1972. The pilot programs were first funded in Fiscal Year 1974.

The Center has direct links with each of the 14 land-grant colleges and universities in the Northeast. Currently, it is supported largely by special grant funds of the Cooperative State Research Service, U.S. Department of Agriculture and by rural development research and extension funds authorized under Title V, Rural Development Act of 1972.

The current members of the Center's Advisory Committee (Board of Directors for the Title V Program) are as follows:

G. A. Donovan, Dean, College of Resource Development, University of Rhode Island
Maynard C. Heckel, Director, Cooperative Extension Service, University of New Hampshire
Robert F. Hutton, Assistant Director, Agricultural Experiment Station, Pennsylvania State University
William A. Lynk, Chairman, Department of Natural Sciences and Mathematics, University of Maryland, Eastern Shore
William E. McDaniel, Dean, College of Agricultural Sciences, University of Delaware
William C. Motes, Director, Economic Development Division, Economic Research Service, U.S. Department of Agriculture, Washington, D. C.
David J. Nolan, State Director, Farmers Home Administration, New York
John W. Scott, Master, National Grange
Doris H. Steele, Area Program Coordinator, The Extension Service, University of Vermont
Ronald L. Stump, Director, Cooperative Extension Service, West Virginia University
N. L. VanDemark, Chairman of Committee, Director, Cornell University Agricultural Experiment Station
Robert E. Wagner, Director, Cooperative Extension Service, University of Maryland

Northeast Public Policy Committee - The Cooperative Extension Director of each state appoints a staff member to the Committee. Members have responsibilities in their respective states for extension educational activities in community resource development and public policy. The U.S. Department of Agriculture is also represented. The Farm Foundation provides financial support for the meetings of the Committee.

The current administrative advisor, designated by the Northeast Cooperative Extension Service directors, is Maynard C. Heckel, University of New Hampshire; the current Committee chairman is Silas B. Weeks, University of New Hampshire.

Northeast Resource Economics Committee - The State Agricultural Experiment Station director of each state appoints two staff members, with research responsibilities in the area of resource economics, to the Committee. The U.S. Department of Agriculture is also represented. The Farm Foundation provides financial support for the meetings of the Committee.

The current administrative advisor, designated by the Northeast State Agricultural Experiment Station directors, is Robert F. Hutton, Pennsylvania State University; the current Committee chairman is Donald J. Epp, Pennsylvania State University.

NE-90 Technical Research Project Committee - This Committee is comprised of the State Agricultural Experiment Station research project leaders who are working on NE-90 "Rural Land Use Policy in an Urbanizing Environment". The Connecticut (Storrs), New Hampshire, New Jersey, New York (Cornell), Vermont, and New Hampshire stations are cooperating in this project which was initiated July 1, 1973. The research objectives are:

(1) Identification, description, and classification of public policy issues relative to agricultural land use in the urbanizing Northeast;

(2) Identification, description, and classification of mechanisms being used and proposed for use at state and local levels for dealing with public policy issues relative to agricultural land use;

(3) Development of legally and administratively feasible alternative policies and mechanisms for affecti[illegible] agricultural resource use as applied to urbanizing situations; and

(4) Assessment of the social and economic impact of alternative policies and mechanisms with respect to utilization of agricultural land in an urbanizing environment.

The administrative advisor for the project is Robert F. Hutton, Pennsylvania State University; the project manager is Howard E. Conklin, Cornell University. Other members of the present Committee are David J. Burns, New Jersey; Dale K. Colyer, West Virginia; Irving F. Fellows, Connecticut; Douglas E. Morris, New Hampshire; and Raymond H. Tremblay, Vermont.

PUBLICATIONS OF THE NORTHEAST REGIONAL CENTER FOR RURAL DEVELOPMENT

Working Papers on Rural Community Services: National Workshop on Problems of Research on Delivery of Community Services in Rural Areas, December 13-16, 1971. Compiled by S. M. Leadley. (Published by the Northeast, the North Central, and the Western Regional Centers, the Southeast Regional Rural Development Research Center at Tuskegee Institute, and the Southern Association of Agricultural Experiment Station Directors)

Papers of the Workshop on Current Rural Development Regional Research in the Northeast, July 25-28, 1972

Publication

1. *Supplement to Task Force Report on Rural Development Research in the Northeast For the Next Five Years — A Framework.* August 1973.
2. *Community Resource Development: A Preliminary Bibliography of Extension-Related Material in the Northeast.* December 1973.
3. *An Inventory of Pilot Projects in Community and Rural Development: Cooperative Extension Programs in the Northeast* (forthcoming).
4. *Papers — Workshop on Evaluating State Title V Pilot Programs in the Northeast, October 29-31, 1974.* January 1975. One dollar per copy.

Programs of the Northeast Regional Center for Rural Development are available without regard to race, color, religion, sex or national origin.

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